CONTRACT AND FISCAL LAW DEVELOPMENTS OF 1999

THE YEAR IN REVIEW

FOREWORD

It seems it was only yesterday when the Contract and Fiscal Law Department wrapped up its 1998 review of acquisition-related issues for its Year-in-Review "Faithful." And now, in less than a blink-of-the-cosmic-eye, the year 2000 will dawn! As you await the gilded gala and hoopla that undoubtedly will signal the birth of a new "millennium," however, we invite you to sit back, relax, and consider where we've been in just the last twelve months.

Of course, all of us can relate to the salient triumphs, tragedies, and wonders brought to us by the major networks and newspapers–a World Cup victory for the U.S. Women; Lance Armstrong's heroic trek through France; the domination of Agassi and Woods; several ill-fated aircraft flights; countless deadly hurricanes, tornadoes, and typhoons; McGwire, Sosa, and the Yankees (*again!*); ethnic cleansing and its antidote, Operation ALLIED FORCE; turning out the lights in Panama; the Clinton impeachment process; the *Microsoft* decision; Pokémon and Picachu; and even Y2K, which has assumed a life of its own along the way.

A bit closer to the acquisition front, though, we have seen the Theater High-Altitude Area Defense system make a big hit with in-the-know observers, breathing new life into missile defense programs. Similarly, the F-22 Advanced Tactical Fighter nearly augered in, pulling out of its steep dive at the last second. And for the first time, a government activity will be a subcontractor to a major defense prime. But perhaps the most interesting aspect of the past acquisition year has been the implementation of reform. Just as late returns arrive at the end of a busy election night, the courts, boards, General Accounting Office (GAO), and policymakers have been assessing and scrutinizing our innovative processes carefully. Indeed, outsourcing and privatization are burgeoning (though the GAO now questions whether the Department of Defense's (DOD) A-76 dividend will be as great as touted); agencies are inventorying their commercial activities feverishly; alternative dispute resolution practices continue to gain momentum; late bid rules have been streamlined substantially; and past performance horizons are coming into view. In some cases, though, such as contract bundling and multiple-award task order contracting, policymakers actually have been forced to rein us in a bit. All in all, it's been a busy year.

As usual, our[1] article is a modest attempt to deliver the grist of this discipline by reviewing the legislation, litigation, regulations, and policies important to the government contract law practitioner. While we cannot recap every case, controversy, or cause, we hope readers will find this work both instructive and entertaining.

CONTRACT FORMATIONS

Authority

AT&T: Fixed-Price Research and Development Contract Ruled Valid[2]

The litigation concerning the Navy's purchase of the Reduced Diameter Array (RDA) from American Telephone & Telegraph Company (AT&T) has become an annual staple of this publication.[3] On the heels of the Court of Appeals for the Federal Circuit's (CAFC) en banc decision in May 1999, one question remains unanswered: Does AT&T have a remedy under a completed fixed-price research and development contract?

American Telephone & Telegraph Company produced the RDA as a subsystem of the Surveillance-Towed-Array Sensor System (SURTASS), which was designed to detect Soviet submarines. It's fixed-price incentive fee contract required research, development, delivery, and testing of an engineering development model. The Navy exercised options for a second engineering development model and three production-level models. Section 8118 of the DOD Appropriations Act for Fiscal Year (FY) 1987[4] prohibited the use of fixed-price contracts for certain developmental contracts unless the Under Secretary

1. Special thanks to those from outside the Department who helped make this a comprehensive, timely, and relevant article: Colonel Jonathan H. Kosarin, Colonel Richard L. Huff, Lieutenant Colonel M. Warner Meadows (USAF), Major Richard W. Rousseau, Major Fred K. Ford, and Major Corey Bradley.

2. AT&T v. United States, 177 F.3d 1368 (Fed. Cir. 1999).

3. *See* Major David A. Wallace et. al., *1998 Contract and Fiscal Law Developments–The Year in Review*, ARMY LAW., Jan. 1999, at 1 [hereinafter *1998 Year in Review*]; Major David A. Wallace et al., *1997 Contract Law Developments–The Year in Review*, ARMY LAW., Jan. 1998, at 10 [hereinafter *1997 Year in Review*]; Major Timothy J. Pendolino et al., *1995 Contract Law Developments–The Year in Review*, ARMY LAW., Jan. 1996, at 21.

4. Pub. L. No. 100-202, 101 Stat. 1329-84 (1986).

of Defense for Acquisition first determined a fixed-price contract was appropriate and notified Congress. The DOD did not meet these requirements prior to awarding the RDA contract to AT&T.

American Telephone & Telegraph Company performed the contract successfully at a final fixed-price of approximately $34.5 million. Alleging that its total cost of performance was at least $91 million, AT&T filed suit in the Court of Federal Claims (COFC) to reform the contract into a cost-reimbursement contract. The COFC declared the contract void ab initio because of the Navy's noncompliance with § 8118 and certified two questions to the CAFC: Whether the contract was void from the start and, if so, whether AT&T could recover unjust enrichment damages based on an implied-in-fact theory.[5]

After a split court affirmed the COFC's ruling that the contract was void ab initio, the CAFC held that AT&T's only theory of relief was to seek return of the delivered goods. Both parties petitioned the CAFC for en banc review. In another split decision, the full CAFC ruled the contract valid, holding that the statutory purpose for § 8118 did not mandate voiding of the contract. The court also cited judicial precedent that favors upholding a fully performed contract. The court then remanded the case to the COFC for a remedy determination.[6]

Since the CAFC did not answer the COFC's certified question concerning an appropriate remedy for AT&T,[7] expect to find yet another update in this publication next year.

A Glimpse into AT&T's Future?

Perhaps the COFC hinted at the outcome of AT&T's claim when it granted summary judgment in favor of Gold Line Refining (Gold Line).[8]

Gold Line's dispute with the Defense Fuel Supply Center (DFSC) concerned a contract for military jet fuel. As awarded, Gold Line's contract called for JP-4 jet fuel, but was amended to add JP-8 fuel. Although the contract included an economic price adjustment (EPA) clause, Gold Line claimed that the DFSC used an adjustment formula and reference prices that failed to reflect Gold Line's actual raw material costs and to comply with applicable FAR provisions.

The DFSC argued that the COFC lacked jurisdiction because the parties had no contract, pointing to Gold Line's allegation that including the EPA clause "rendered the contract illegal in its entirety."[9] Citing *Urban Data Systems v. United States*,[10] the court concluded that to the extent Gold Line's contract was not express, it was implied-in-fact, and therefore subject to the court's jurisdiction. The court reasoned that the parties had an agreement for the supply and purchase of fuel. Therefore, the contract was not void despite its deficient price term.

The court then addressed each of Gold Line's claims for relief and denied the government's motion to dismiss the contractor's claims for quantum meruit and reformation. As to the claim for quantum meruit relief, the court stated:

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5. AT&T v. United States, 32 Fed. Cl. 672 (1995).

6. *AT&T*, 177 F.3d at 1377.

7. The CAFC did not address the remedy issue because the COFC had considered AT&T's claim only on the premise that the contract was void. The appropriate remedy in this case will not be agreed upon unanimously. The CAFC's majority pointed out that when a contract or a provision thereof is unlawful, the courts have sustained the contract, reformed it to correct the illegal term, or allowed recovery under an implied contract theory. In a dissenting opinion, however, Judge Plager wrote:

> If AT&T is to have any remedy entitling it to more than what it has been paid, its claim must be based on some sort of equitable claim for payment for goods sold and delivered, a *quantum valebat* claim. Even assuming for discussion purposes that the Court of Federal Claims could exercise the powers of a court of equity, AT&T has no equity on its side, and therefore is not entitled to the intervention of a court of equity.

Id. at 1383-4 (Plager, J., dissenting). Messrs., Nash and Cibinic disagree with Judge Plager, opining "that recovery on the basis of quantum meruit as permitted in [United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986)] and [Gould, Inc. v. United States, 67 F.3d 925 (Fed. Cir. 1995)] and *Yosemite Park & Curry Co. v. United States*, 217 Ct. Cl. 360, 582 F.2d 582 (1978)–which were either distinguished or ignored by the CAFC in both AT&T I or AT&T II–would be appropriate." Ralph C. Nash & John Cibinic, *POSTSCRIPT*: *Invalid Contracts*, 13 THE NASH & CIBINIC REP. NO. 9, 134 (Sept. 1999).

8. Gold Line Refining v. United States, 43 Fed. Cl. 291 (1999).

9. *Id.* at 294.

10. 699 F.2d 1147 (Fed. Cir. 1983). The Urban Data contracts were for paper computer forms, and included price adjustment clauses that were "price plus a percentage of costs" provisions that violated 41 U.S.C.A. § 254(b) (West 1999). Because the government bargained for, agreed to pay for, and received the supplies, the court concluded that an implied-in-fact contract existed. *Id.*

> The decisions in *Urban Data Systems*, *Amdahl*, and *Prestex*[11] contemplate that when the government retains benefits in the form of goods or services under a contract determined invalid for failure to comply with certain regulatory requirements or bidding procedures, courts may grant relief of a quasi-contractual nature to the contractor . . . Here, where the contract has been fully performed by the contractor and has not been disavowed by the government, the rationale for recognizing a right to recover appears to this court to apply with even greater force.[12]

Authority Rules–No Relaxation in the Islands

When a court cites to *Federal Crop Ins. Corp. v. Merrill*,[13] a contractor can "strike the tent."[14] Such was the case in *Sam Gray Enterprises, Inc. v. United States*.[15]

Sam Gray, a Bahamian realtor and citizen, contended that he had entered into a five-year lease of twenty-four apartment units with the *Charge d'affaires*[16] of the U.S. Embassy in the Bahamas. The apartments were used by employees of government contractors working on a drug interdiction program in the Bahamas. When the government contractors vacated the apartments early, Gray filed breach of contract and promissory estoppel claims at the COFC.

In granting the government's motion for summary judgment, the COFC held that the *Charge d'affaires* lacked authority to enter into a five year lease arrangement.[17] In addition, only the Secretary of State or specific delegees were authorized by statute to enter into a lease for less than ten years that required an annual payment exceeding $25,000. The COFC also held that the *Charge d'affaires* had received no grant of authority from an authorized contracting officer.[18]

Hey DEA, How About Something for the Effort?

What do a contract pilot and an informant have in common? In separate cases, neither was able to convince the COFC that an enforceable contract resulted from representations made by Drug Enforcement Agency (DEA) field agents.

In *Henke v. United States*,[19] a private pilot participating in a DEA sting operation sought $250,000 for transporting 18,000 pounds of marijuana from Colombia to Mexico. Contrary to DEA plans, the marijuana was never transported into the United States. As a result, no arrests, convictions, or forfeitures resulted from the investigation. The plaintiff contended that he completed the mission once he dropped the marijuana in Mexico, and his express oral contract with DEA's resident agent in Tampa contemplated payment of $250,000.[20] The plaintiff argued alternatively that an implied-in-fact contract arose when the DEA allowed him to perform the mission knowing that he expected to be paid $250,000.

The COFC found both lack of contract authority and ratification in granting the government's summary judgment motion. Only the Administrator of the DEA or the Attorney General could authorize a payment of $250,000 from the Assets Forfeiture Fund,[21] the only potential source of payment for the pilot. The court concluded that the pilot failed to prove implied

11. Prestex, Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963).

12. *Gold Line Refining*, 43 Fed. Cl. at 295-96.

13. 332 U.S. 380 (1947). In *Merrill*, the Supreme Court stated that a contractor bears "the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id*. at 384.

14. Last words of General Robert Edward Lee. BARTLETT'S FAMILIAR QUOTATIONS 440:13 (16th ed. 1992).

15. 43 Fed. Cl. 596 (1999).

16. The *Charge d'affaires* is a term for the official who becomes the head of an embassy when the Ambassador is out of the country. *Id*. at 598 n.1.

17. The court pointed out that pursuant to the Federal Acquisition Regulation, the only official with contract authority by virtue of position is the agency head. *Id*. at 603 (citing GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.601 (June 1997) [hereinafter FAR]).

18. *Sam Gray Enterprises*, 43 Fed. Cl. at 603. *See* Hercules, Inc. v. United States, 516 U.S. 417 (1996) (holding that contract jurisdiction is based only on express or implied-in-fact contracts, not those implied-in-law).

19. 43 Fed. Cl. 15 (1999).

20. The pilot and the DEA agent discussed the fee arrangement. The agent testified that he told the pilot "if you can't afford this, don't do it because we don't know that we're going to get paid in this case." The pilot, who had flown previous missions for the DEA, testified that he received the same warning on previous missions: "I don't think this operation may turn out as planned. If it doesn't come off as planned, you'll have trouble getting paid." *Id*. at 22.

21. 28 U.S.C.A. § 524 (West 1999). The Department of Justice Assets Forfeiture Fund allows for payments, at the discretion of the Attorney General, of awards for information or assistance leading to civil or criminal forfeiture. The DEA implements the payment procedure in its Agents' Manual and requires evaluations of the utility of information or assistance after the forfeiture is complete.

ratification because the DEA Administrator had no actual or constructive knowledge of the "contract," and took no steps to ratify it, either in writing, orally, or by conduct.

The informant in *Khairallah v. United States*[22] fared no better than Henke. The DEA agreed to pay the informant a reward of twenty-five percent of the value of any seized drugs. When the DEA paid no reward in two cases, and only ten percent in a third case, the informant filed suit at the COFC.

Khairallah advanced arguments similar to those raised by the pilot in *Henke*: the field agents had contract authority to bind the DEA or, alternatively, the DEA had ratified the agreement. Judge Bruggink, who also decided *Henke*, held that the field agents did not possess implied actual authority to contract because contracting authority was not integral to their duties. Therefore, only express delegations of authority not present here could authorize an agent to contract. Judge Bruggink also reasoned that the ability to promise a reward of an unknown sum is inherently at odds with a procurement system controlled by authority limitations.[23] The informant's argument for ratification also failed, and the COFC granted the DEA's summary judgment motion.[24]

Competition

Competition continued to be a hotly contentious issue this past year. The never-ending attempt to balance fairness and efficiency in the acquisition process resulted in many pitched battles upon the field of the Competition in Contracting Act (CICA).[25]

Out-of-Scope Modifications

In 1998, we noted the sizable number of protests that successfully challenged out-of-scope modifications as violating the statutory competition requirements.[26] This year, the major development in this area was of a more analytical nature. Unfortunately, the GAO issued a decision that did more to cloud than to clarify the means by which practitioners judge contract modifications for protest purposes.

In *Access Research Corp.*,[27] the Air Force contracted with Mercer Engineering Research Center (MERC) for engineering services. Specifically, MERC was to investigate various computer-aided design (CAD) software programs to determine how CAD files could be converted from one format to another. In May 1995, the Air Force issued Modification No. 6, requiring MERC to digitize the agency's entire technical order warehouse,[28] and funding the digitization of the first two million pages.[29] In September 1998, by Modification No. 16, the Air Force funded the digitization of the remaining 4.5 million pages. Access Research Corporation (ARC) challenged the Air Force's actions to acquire digitization services from MERC as outside the scope of the original contract.[30]

The GAO first concluded that ARC's protest was untimely to the extent it challenged Modification No. 6.[31] The GAO then denied ARC's protest regarding Modification No. 16, finding that it was not materially different from the original contract and all prior changes.[32]

In determining whether a modification triggers the CICA's competition requirements, previous GAO decisions have looked to whether there was a material difference between the modified contract and the contract as originally awarded.[33] Evidence of a material difference included the extent of changes in

22. 43 Fed. Cl. 57 (1999).

23. *Id.* at 64.

24. *Id.* at 64-65.

25. The Competition in Contracting Act of 1984, Pub. L. No. 98-369, Div. B, tit. VII, 98 Stat. 1175 (codified as amended in various sections of 31 U.S.C. and 41 U.S.C.).

26. *See 1998 Year in Review, supra* note 3, at 5.

27. B-281807, Apr. 5, 1999, 99-1 CPD ¶ 64.

28. An Air Force technical order, synonymous to an Army technical manual, provides the end user with information regarding the repair, maintenance, and engineering of the pertinent item. The Air Force estimated its entire technical order warehouse at approximately ten million pages of documents. *Access Research*, 99-1 CPD ¶ 64 at 2.

29. The Air Force subsequently modified MERC's contract several times to fund the digitization of another two million pages. *Id.*

30. Specifically, ARC alleged that the agency's digitization requirements, beginning with Modification No. 6 and culminating with Modification No. 16, were outside the scope of the contract under which they were issued. *Id.*

31. *Id.* at 3. The agency's initial decision to require digitization of its technical orders occurred 3 1/2 years before ARC's protest. *Id.*

32. *Id.* at 3-4.

the type (or amount) of work, performance period, and contract price.[34] In determining whether such a material difference existed in the present case, the GAO compared the protested modification with the "basic contract," a term denoting not only the contract as originally awarded but also all intervening modifications.[35] The GAO then held that because the basic contract already included "the digitization of the entire [technical order] warehouse,"[36] the last incremental action completing the requirement was not a material change.[37]

The GAO's decision to factor intervening modifications into the "material difference" analysis is both novel and questionable. Undisputedly, modifications alter the legal relationship between a contract's parties. Nonetheless, it does not follow necessarily that such modifications should alter the legal relationship between the agency and all offerors with respect to competition. Even the cases cited by the GAO do not support the proposition that the CICA analysis should focus on comparing the "contract, as modified,"[38] to the last agency modification.[39] Further, if the overall inquiry is "whether the modification is of a nature which potential offerors would reasonably have anticipated"[40] prior to initial award, then considering intervening changes can obscure this determination.

Sole-Source Authority

In 1999, the GAO and the COFC reviewed several challenges to agency use of noncompetitive acquisitions.[41] Of importance, in *Diversified Technology & Services of Virginia, Inc.*,[42] the GAO found that an agency's discretion to "plan for the long term rather than to opt for a short-term 'fix'"[43] reasonably justified a sole-source extension of the existing contract.

In September 1997, the U.S. Department of Agriculture (USDA) awarded a contract for operation and maintenance support services to Diversified.[44] In the course of ensuing protests, the agency recognized that its evaluation had been improper.[45] The government terminated Diversified's contract for convenience, and directed the incumbent continue its contract performance. From November 1997 to March 1999, the agency revised the acquisition continuously.[46] On 5 March 1999, the agency published in the Commerce Business Daily (CBD) a notice of its intent to negotiate a sole-source extension to the existing contract pending award of a new contract. Diversified protested, contending that the agency's lack of advance planning was an inadequate rationale for the noncompetitive acquisition.

The GAO disagreed, finding that although the agency's revised acquisition had moved slowly, there did not exist a lack

33. *See* L-3 Communications Aviation Recorders, B-281114, Dec. 28, 1998, 99-1 CPD ¶ 18 at 7; Sprint Communications Co., B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60 at 6; MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7; Neil R. Gross & Co., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212 at 2-3, *aff'd on reconsideration*, B-237434.2, May 22, 1990, 90-1 CPD ¶ 491. *See also* AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993) (determining whether the contract as modified materially departs from the scope of the original procurement).

34. *See L-3 Communications*, 99-1 CPD ¶ 18 at 7-8; *Sprint Communications*, 98-1 CPD ¶ 60 at 6; *MCI Telecomms.*, 97-2 CPD ¶ 90 at 7-8.

35. *Access Research*, 99-1 CPD ¶ 64 at 4.

36. *Id.*

37. *Id.* The GAO rejected the protester's argument of comparing the modification in question to the contract as originally awarded. After reviewing the useful purposes served by modifications (e.g., providing the government with the flexibility to alter its requirements without conducting a new procurement), the GAO reasoned that disregarding intervening modifications would be disregarding new contract requirements. *Id.* at 5.

38. *Id.* By the end of the *Access Research* decision, the GAO's use of the term "contract, as modified" does not denote the protested action, as it had in prior decisions, but the baseline from which to determine material differences. *Id.*

39. *See* Hughes Space and Communications Co., B-276040, May 2, 1997, 97-1 CPD ¶ 158 at 5 ("We consider whether the contract as modified is materially different from the original contract for which competition was held."); MasterSec., Inc., B-274990, B-274990.2, Jan. 14, 1997, 97-1 CPD ¶ 21 at 5 ("We look to whether there is a material difference between the modified contract and the contract originally competed.").

40. Neil R. Gross & Co., B-237434, Feb. 23, 19990, 90-1 CPD ¶ 212 at 3, *cited in* AT&T Communications, Inc. v. Wiltel, 1 F.3d 1201, 1207 (Fed. Cir. 1993).

41. Metric Sys. Corp. v. United States, 42 Fed. Cl. 306 (1998) (holding that the Air Force was justified in the sole-source procurement of the upgrade to the Miniature-Multiple Threat Emitter System, as only one responsible source could meet its needs); National Aerospace Group, Inc., B-282843, 1999 U.S. Comp. Gen. LEXIS 151 (Aug. 30, 1999) (holding that the Defense Logistics Agency's sole-source procurement of specific cobalt-alloy tubing was improper where the documentation failed to show that only this exact product would satisfy the agency's need, or that such need was of an unusual and compelling urgency).

42. B-282497, 1999 U.S. Comp. Gen. LEXIS 119 (July 19, 1999).

43. *Id.* at *9.

44. *Id*. The contract was for the USDA's Southern Regional Research Center in New Orleans, Louisiana. *Id.*

45. *Id.* The agency's proposed corrective action was to reevaluate proposals and make a new source selection based on that reevaluation. *Id.*

of advance planning.[47] The fact that the delays resulted from the agency's efforts to implement a long-term plan by changing contract types did not alter the valid sole-source justification.

Developing Specifications: Whose Requirement Is This Anyway?

In *APTUS Co.*,[48] the Army issued a request for quotations (RFQ) to upgrade the Watervliet Arsenal's automated storage and retrieval system (AS/RS).[49] In its technical proposal, APTUS offered not only to replace the required items, but also to reconfigure the whole AS/RS system. APTUS protested when the Army chose a competitor that proposed a technically acceptable solution and lower price, and also demonstrated satisfactory past performance.[50]

APTUS argued that the Army had not defined its own needs correctly and that nothing short of a complete reconfiguration of the AS/RS would suffice.[51] The GAO denied the protest, holding that its responsibility was "to ensure that the statutory requirements for full and open competition are met, not to determine whether different specifications might better meet the agency's needs."[52] Unless a specification is unduly restrictive or exceeds the agency's minimum needs, the GAO will afford agencies the discretion to define their own requirements.[53]

Unfair Competitive Advantage

During the past year, the GAO and the COFC adjudged several cases where the unsuccessful offeror alleged unfair competitive advantage.[54] In each case, the decision was the same: stop whining and recognize that no two competitors are alike. In *Electronic Design*,[55] the offeror protested the Navy's contract award to Litton Integrated Systems for CG 47 *Ticonderoga* class[56] integrated ship control system upgrades. Electronic Design contended that Litton had an unfair competitive advantage because of its access to detailed configuration drawings obtained from a corporate affiliate.[57] The GAO confirmed in large part the protestor's factual assertions but denied the protest. The GAO held that "an agency is not required to construct its procurement in a manner that neutralizes the competitive advantage that some potential offerors may have over others by virtue of their own particular circumstances, such as prior or

46. *Id.* The agency transferred responsibility for the procurement to a different division. A new contracting officer reviewed the procurement, decided to change the contract type from cost-reimbursement to fixed-price, and determined that a reevaluation of the initial submissions was impractical. Although the performance work statement (PWS) remained unchanged in the revised solicitation, the reallocation of risk associated with the change in contract type resulted in 119 questions from prospective offerors. After reviewing the questions, the contracting officer determined that the agency should rewrite the PWS. The USDA personnel at two locations made concerted efforts to edit and redraft the new PWS. When it became apparent that internal workload prevented redrafting the PWS as quickly as necessary, the agency hired a contractor to rewrite the PWS. After three months, the contractor delivered its final PWS draft, which the agency then reviewed and finalized for release. *Id.*

47. *Id.* at *10 (citing Sprint Communications Co., L.P., B-262003.2, Jan. 25, 1996, 96-1 CPD ¶ 24 at 9). The GAO commented that "CICA clearly requires advance procurement planning . . . but CICA does not require that such planning be entirely successful or error-free." *Id.*

48. B-281289, Jan. 20, 1999, 99-1 CPD ¶ 40.

49. The AS/RS is a computer-controlled warehouse storage system, in which items stored on pallets at 1600 locations on a multi-level high-rise rack system can be retrieved automatically. The AS/RS host computer, using database management system software, together with two microprocessors and numerous programmable logic controllers, directs cranes and rollers to stack and retrieve palletized items robotically. The RFQ required offerors to upgrade the AS/RS by replacing the host computer, related peripherals, and the operating software. *Id.* at 2-3.

50. The basis for award was best value, judged in terms of price and past performance, among technically acceptable offers. *Id.* at 3.

51. *Id.* at 4.

52. *Id.* at 4 (citing Purification Envtl., B-259280, Mar. 14, 1995, 95-1 CPD ¶ 142 at 3).

53. *Id.*

54. Metric Sys. Corp. v. United States, 42 Fed. Cl. 306 (1998); Vero Technical Servs., B-282373.3, B-282373.4, U.S. Comp. Gen. LEXIS 148 (Aug. 31, 1999); Electronic Design, Inc., B-279662.5, 1999 U.S. Comp. Gen. LEXIS 88 (May 25, 1999); Lance Ordnance, Inc., B-281342, Jan. 26, 1999, 99-1 CPD ¶ 23; Knights' Piping, Inc, World Wide Marine & Indus. Servs., B-280398.2, B-280398.3, Oct. 9, 1998, 98-2 CPD ¶ 91; B3H Corp., B-280374, Sept. 23, 1998, 98-2 CPD ¶ 88.

55. B-279662.5, 1999 U.S. Comp. Gen. LEXIS 88 (May 25, 1999).

56. The CG 47 *Ticonderoga* class ships are modern U.S. Navy guided missile cruisers. These surface combatants are capable of supporting carrier battle groups or amphibious forces, or of operating independently and as flagships of surface action groups. DEP'T OF NAVY, *Navy Fact File* (visited Oct. 19, 1999) <http://www.chinfo.navy.mil/ navpalib/factfile/ships/ship-cru.html>.

57. *Electronic Design*, 1999 U.S. Comp. Gen. LEXIS 88, at *4. Ingalls Shipbuilding, Inc., a corporate affiliate of Litton, was the Navy's "planning yard" contractor for this ship class. A Navy planning yard contract provides for general engineering and technical support for a class or classes of ships. This contract is one of the three related to the repair and modernization of existing Navy ships. *Id.*

current government contracts."[58] Rather, the competitive advantage becomes unfair only when it results from improper government motives or actions.[59]

Publicizing Solicitations

In the past year, the GAO decided two cases that refined an agency's obligation to publicize solicitations. In *Aluminum Specialties, Inc. t/a Hercules Fence Co.*,[60] the Navy synopsized its need for fence installation and repair services in the CBD and made appropriate use of its bidders mailing lists,[61] but did not advertise the solicitation in local newspapers as it had done in the past. In *Interproperty Investments, Inc.*,[62] the General Services Administration (GSA) advertised its requirement for lease space in two local newspapers, but made no deliberate effort to solicit the incumbent.[63] In both cases, the GAO opined that the agencies had met the CICA mandate for full and open competition. It deemed an agency's "diligent good-faith effort to comply with the statutory and regulatory requirements regarding notice of the procurement and distribution of solicitation materials"[64] to be synonymous with achieving full and open competition. Whether an agency could have gone the proverbial "extra mile" did not determine if an agency met the CICA competition standard.

Reprocurement Contracts

This year, the GAO continued to define the discretion afforded contracting officers in reprocurement contracts. In *Vereinigte Gebäudereinigungsgesellschaft*[65] (VGR), the GAO denied a protest objecting to a new requirement during a reprocurement action that was not included in the original procurement. The Army solicited bids for custodial services for the DOD Schools in Wuerzburg, Germany. The invitation for bids (IFB) required bidders to furnish proof, after award, that its project supervisors were able to write and speak both English and German fluently.[66] Soon after contract award, the contracting officer discovered that the awardee's supervisors could not communicate in English, and the contracting officer terminated the contract for default. During the reprocurement action,[67] the contracting officer required bidders to demonstrate the English-speaking capabilities of their project supervisors *before award*. Although next in line for award under the original procurement, VGR could not comply with the modified requirement. As a result, the contracting officer awarded the reprocurement contract to the next low bidder.

The GAO found that it was both permissible and reasonable for the Army to modify the terms of the reprocurement contract: "There is no requirement that a repurchase be conducted using precisely the same terms as in the original procurement . . . provided that a reasonable price and competition to the maximum extent practicable are obtained."[68] Further, the Army acted rationally when it altered the terms of the repurchase, given that it had just terminated the original contractor for failing to comply *after award* with a stated requirement.

Contract Types

Proposed FAR Changes

Award Fee Determinations

On 6 May 1999, the Federal Acquisition Regulatory Council (FAR Council) proposed an amendment to the FAR that will

58. *Id.* at *13.

59. *Id.*

60. B-281024, Nov. 20, 1998, 98-2 CPD ¶ 116.

61. *Id.* at 2. The Navy also advertised the solicitation by posting a notice on the bulletin board outside the local contracts office, even though not required by the FAR given the expected contract price. *Id.*

62. B-281600, Mar. 8, 1999, 99-1 CPD ¶ 55.

63. *Id.* at 8-9. Importantly, the GAO found no evidence that the agency had excluded the incumbent deliberately. The GAO concluded that the omission was the unintentional consequence of following established procedures without forethought. *Id.* at 7.

64. *Aluminum Specialties*, 98-2 CPD ¶ 116 at 3-4.

65. B-280805, Nov. 23, 1998, 98-2 CPD ¶ 117.

66. Specifically, the IFB required bidders to furnish proof of their project supervisors' requisite certifications and bilingual abilities within five days of the contracting officer's post-award request. The IFB also warned that a failure to comply could result in a nonresponsibility determination. *Id.* at 3.

67. *Id.* at 5. The contracting officer did not issue a new IFB, but instead reprocured without resolicitation using the original solicitation offers. *Id.* at 5. *See* FAR, *supra* note 17, at 49.402-6(b), 52.249-8(b) (authorizing reprocurement without resolicitation, using "any terms and acquisition method deemed appropriate for the repurchase").

68. *Vereinigte*, 98-2 CPD ¶ 116 at 10 (citing Bud Mahas Constr., B-235261, Aug. 21, 1989, 89-2 CPD ¶ 160 at 4).

bring award fee determinations within the purview of the disputes clause of a contract.[69] This proposed rule is a direct response to decisions in *Burnside-Ott Aviation Training Center v. Dalton*[70] and *Rig Masters, Inc. v. United States*.[71] The rule proposes to amend FAR 16.405-2(a), which currently precludes the Armed Services Board of Contract Appeals (ASBCA) from assuming jurisdiction of a contracting officer's award fee determination under a cost-plus-award-fee contract.[72]

Option to Extend Service

On 22 January 1999, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (DAR Council) issued a proposed rule to amend the FAR to allow contracting officers to tailor the time period for providing preliminary notice that the agency intends to exercise an option.[73] The standard rule is sixty days, but the proposed rule allows contracting officers to specify a different period.

New Rule Prohibits Designation or Allocation of Preferred Awardees In Multiple Award Indefinite-Delivery Contracts

On 17 June 1999, the Civilian Agency Acquisition Council and the DAR Council issued a final rule to prohibit the designation or allocation of any preferred awardees in multiple award indefinite-delivery contracts.[74] The new rule amends FAR 16.505 to provide each awardee with fair consideration for each order over $2500. It also addresses the competition concerns that the DOD Inspector General expressed in its 2 April 1999 report.[75] The report noted that DOD agencies fail to take full advantage of the benefit of having multiple awardees. For example, the report found that DOD agencies awarded consistently task orders to higher-priced bidders and issued the task orders on a sole-source basis without providing other multiple awardees a "fair opportunity" to be considered for the award.[76] In response, Eleanor Spector, the Director of Defense Procurement, issued a memorandum cautioning the DOD agencies to use multiple task order contracts "in situations in which all contractors are generally capable of performing all work under the proposed contract."[77]

Requirements Contracts

Constructive Termination for Convenience Cannot be Invoked Retroactively in Requirements Contracts

In *Carroll Automotive*,[78] the ASBCA denied the Air Force's motion to dismiss the contractor's appeal based on the doctrine of constructive termination for convenience.[79] Instead, the board concluded that the Air Force breached its requirements contract[80] by failing to order all of its requirements from Carroll. In so doing, the board ruled that the Air Force may not argue retroactively that its actions (such as purchasing the automotive parts accessories from another contractor) constituted partial constructive terminations for convenience.

In September 1990, the Air Force awarded a requirements contract to Carroll. The contract required Carroll to provide automotive parts and accessories for various vehicles and miscellaneous equipment at Luke Air Force Base, Arizona. The contract specified a base year and four option years, effective 1 November 1990. In December 1995, Carroll learned that the Air Force had purchased vehicle parts and supplies from other contractors, thus breaching the requirements clause[81] in its contract. When Carroll requested the Air Force to provide complete purchase records for the total contract period, the Air Force only supplied records for 1995.[82] From these purchase records, Carroll estimated that it lost $46,013 in profits for 1995. In June 1996, Carroll submitted a claim for lost profits totaling $184,052.[83] In June 1997, the contracting officer granted Carroll partial relief on the claim by paying it $15,318.94 in "lost anticipatory profits" for calendar year 1995. The contracting officer, however, denied the remainder of the Carroll's claim because it failed to substantiate any monetary

69. 64 Fed. Reg. 24,472 (1999).

70. 107 F.3d 854 (Fed. Cir. 1997) (holding that the standard award fee clause did not preclude ASBCA jurisdiction under the Contract Disputes Act (CDA) to determine whether the government acted in bad faith, abused its discretion, or acted in an arbitrary or capricious manner).

71. 42 Fed. Cl. 369, 372-74 (1998) (holding that the standard value engineering clause, which stated that the contracting officer's decision is not subject to the disputes clause (similar to the award fee clause) cannot stand because it conflicts with the CDA). *See* FAR, *supra* note 17, at 52.248-1(e)(3).

72. 64 Fed. Reg. at 24,472. The proposed rule also will affect FAR 16.406, FAR 48.103, FAR 52.219-10, FAR 52.219-26, FAR 52.226-1, FAR 52.248-1, and FAR 52.248-3. *Id.*

73. *Id.* at 3618.

74. *Id.* at 32,746.

75. DEP'T OF DEFENSE, INSPECTOR GENERAL'S REP., DOD USE OF MULTIPLE AWARD TASK ORDER CONTRACTS, REP. NO. 99-116 (2 Apr. 1999) [hereinafter INSPECTOR GENERAL'S REP.]. The report found that by deviating from the FAR, the DOD contracting officers awarded too many sole-source task orders, awarded task orders without considering price, failed to document award decisions properly, and failed to report ordering information to the DOD contracting system.

76. *Id*. at 3-14.

entitlement for the prior four years.[84] In September 1997, Carroll appealed to the ASBCA.

On appeal, the Air Force moved to dismiss, alleging that Carroll failed to state a claim upon which relief can be granted. The Air Force argued that purchasing the required parts and accessories from other contractors constituted partial constructive terminations for convenience.[85] Based solely on this legal theory, the Air Force argued that the contract's termination clause[86] precluded Carroll from recovering profit on the terminated work.[87]

The board disagreed. First, the board ruled that "[p]roof of a constructive convenience termination is not an element of [Carroll's] claim."[88] Therefore, Carroll had no duty to allege bad faith, abuse of discretion, or arbitrary or capricious conduct

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77. Memorandum, Director of Defense Procurement, to Directors of Defense Agencies, subject: Use of Multiple Award Task Order Contracts (30 Apr. 1999). Ms Spector continued:

> This does not mean that all awardees must be equally capable in all areas. What must be avoided are situations in which some or all awardees specialize exclusively in one or a few areas within the broader statement of work, thus creating the likelihood that tasks in those areas will be awarded on a sole-source basis.

Id. On 20 July 1999, Ms. Spector directed each military department to select ten multiple award task order situations and provide information on the following on a semi-annual basis:

1. Number of contracts in each multiple award situation;
2. General nature of services procured in each multiple award situation;
3. For each situation, the number of task orders awarded in the period;
4. For each situation, the number of competitive solicitations for task orders issued in the period;
5. For each situation, the number of offers submitted for each competitive solicitation;
6. For each situation, the number of task orders awarded in the period on the basis of a "fair opportunity to be considered" without the issuance of a competitive solicitation;
7. For each situation, the number of uses of exceptions cited in FAR 16.505(b)(2). Indicate the number of times each exception was used.

Memorandum, Director of Defense Procurement, to Deputy Assistant Secretary of the Army (Procurement), subject: Reporting on the Use of Multiple Award Task Order Contracts (20 July 1999). Ms. Spector's direction is similar to the direction issued by Ms. Diedre Lee, Administrator, Office of Federal Procurement Policy (OFPP) on 2 June 1999. *See OFPP's Lee Considers New FAR Rule To Curb Noncompetitive Use Of Multiple Award Task Order Contracts*, 41 THE GOV'T CONTRACTOR NO. 22, at 3 (June 2, 1999).

78. ASBCA No. 50993, 98-2 BCA ¶ 29,864.

79. The constructive termination for convenience is a judicially-created doctrine based on the concept that a contracting party who is sued for breach of contract may ordinarily defend on the ground that a legal excuse for non-performance existed at the time of the breach, even though the contracting party was unaware of the excuse. *See* College Point Boat Corp. v. United States, 267 U.S. 12 (1925); Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).

80. A requirements contract is generally used for purchasing supplies or services when the government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that the designated (in the contract) government agencies will need during the contract performance period. FAR, *supra* note 17, at 16.503(b).

81. *Id.* at 52.216-21(c). The requirements clause states, in part: "Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule." *Id*.

82. The contracting officer did not provide purchase records for the previous four years because the agency did not breach the requirements contracts for those years. Telephone Interview with Major David Frishberg, USAF, Trial Attorney (Apr. 8, 1999) [hereinafter Frishberg Interview].

83. *Carroll*, 98-2 BCA ¶ 29,864 at 147,779. This amount covered four of the five years of the total contract period based on the 1995 purchase records provided by the Air Force. *Id*.

84. *Id.* Ironically, the contracting officer denied the monetary claim for the previous four years even though it was the Air Force that failed to provide Carroll with the purchasing records for those years. *Id*.

85. *Id.* It is interesting to note that the contracting officer's final decision failed to categorize the Air Force's actions as partial terminations. The partial termination for convenience theory did not surface until the Air Force moved to dismiss the appeal. *Id*.

86. *See* FAR, *supra* note 17, at 52.249-2. The termination clause provides, in part: "If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon." *Id.*

87. The termination for convenience clause specifically limits recovery of profit to work completed by the contractor prior to the termination: "[T]he Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount *may include a reasonable allowance for profit on work done . . . .*" *Id*. (emphasis added). FAR, *supra* note 17, at 52.249-2(f).

by the Air Force. Second, the board concluded that the Air Force could not rely upon the constructive termination for convenience doctrine to breach a requirements contract retroactively and thus change its obligations under the completed contract.[89] In arriving at this conclusion, the board relied on *Maxima Corp. v. United States*.[90] The *Maxima* court held that the government cannot use the constructive termination for convenience doctrine to terminate a fully performed contract retroactively and limit its liability for failing to order the minimum guaranteed quantity required by the contract.[91] Although *Maxima* involved a partial convenience termination on an indefinite-delivery/indefinite-quantity (IDIQ) contract rather than a requirements contract, the board concluded that *Maxima* applied because the Air Force invoked the constructive termination for convenience doctrine after completing the contract.

Finally, the board held that bad faith, abuse of discretion, or arbitrary or capricious actions by the Air Force are not the exclusive bases for recovering lost profit.[92] The board noted that the termination for convenience clause requires an equitable adjustment in the contract price when a partial termination would preclude lost profits on unperformed work. In reaching this conclusion, however, the board relied upon the contracting officer's final decision allowing Carroll to recover an additional $15,318.94 for lost profits as an equitable adjustment. As a result, the board concluded that the partial termination for convenience under the requirements contract did not prohibit Carroll from recovering lost profit.[93]

Illusory Contract

In *Satellite Services, Inc*.,[94] the United States Property and Fiscal Officer for Missouri (USPFO) issued a request for proposals (RFP) for a multiple-award, multiple-year task order contract for maintenance, repair, and construction work at various locations in Missouri. The RFP did not state a guaranteed minimum quantity and contained several ambiguous provisions.[95] Indeed, the RFP incorporated bits and pieces of both a requirements contract and an IDIQ contract.

Satellite Services protested, claiming that the RFP was illusory for lack of sufficient consideration. It argued that the contract lacked the consideration required for an enforceable contract regardless of what type of contract the agency intended (a requirements versus an IDIQ contract).[96] In response, the USPFO argued that the RFP would result in an enforceable requirements contract. Specifically, the agency argued that a

88. *Carroll*, 98-2 BCA ¶ 29,865 at 147,780.

89. *Id*.

90. 847 F.2d 1549 (Fed. Cir. 1988). In *Maxima*, the Environmental Protection Agency (EPA) had a contract for typing, photocopying, editing, and related services. The EPA failed to order the contract's guaranteed minimum quantity during the contract performance period. One year later, the EPA terminated the contract retroactively for the convenience of the government. *Id*. at 1550-51.

91. The *Maxima* court held:

> The termination for convenience clause can appropriately be invoked only in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties . . . The termination for convenience clause will not act as a constructive shield to protect defendant from the consequences of its decision to follow an option considered but rejected before contracting . . . No judicial authority has condoned use of the convenience clause to create a breach retroactively, where there was none, in order to change the government's obligations under a completed contract.

Id. at 1553-54.

92. *Carroll*, 98-2 BCA ¶ 29,865 at 147,780.

93. *Id*. at 147,780. After the board denied the Air Force's motion to dismiss, the Air Force and Carroll settled the appeal for under $5000. Frishberg Interview, *supra* note 82.

94. B-280945, B-280945.2, B-280945.3, Dec. 4, 1998, 98-2 CPD ¶ 125.

95. *Id*. at 2. The RFP provided, in part:

> [T]he contracting officer will not have to provide the contractors with the opportunity to compete where there is an urgent need; where he determines that only one contractor can provide the services because of their unique or highly specialized nature; where a project is a "logical follow-on to an order already issued under the contract"; or "when otherwise determined to be in the best interest of the government." Further, the government reserves the right to contract for work outside the task order contract if the contracting officer determines that the price obtained through competition among the contractors is not fair and reasonable.

Id.

96. *Id*. at 2-3. Satellite argued that if the agency intended a requirements contract, it lacked consideration because the contract allowed the agency to fulfill its requirements from other sources. Likewise, if the agency intended an IDIQ contract, it lacked consideration because the contract did not state a guaranteed minimum quantity. *Id*.

provision in the RFP allowed all contractors to participate in a limited competition for all future requirements for construction services between $2000 and $3,000,000.[97]

Unfortunately, the GAO disagreed. The GAO opined that the government promises to buy all of its requirements for the same items or services exclusively from the same contractor under a requirements contract.[98] This promise is the government's only consideration for the contract. The GAO found it difficult to fashion an argument for a requirements contract because the RFP intended multiple awards.

In the alternative, the USPFO argued that the contract was an IDIQ contract; however, the GAO also disagreed with this assertion.[99] The GAO pointed out that the government must purchase a guaranteed minimum quantity under an IDIQ contract, a requirement missing from the RFP. The GAO concluded that the RFP would not result in an enforceable contract and sustained the protest.[100]

Indefinite-Delivery-Indefinite-Quantity Contracts

The Contracting Officer Must Justify Single Award Determination For IDIQ Contract Before Issuing Solicitation

In 1994, the Federal Acquisition Streamlining Act (FASA) established a preference for making multiple awards of IDIQ contracts.[101] The FAR implemented this requirement in FAR 16.504(c).[102] The court in *WinSTAR Communications, Inc. v. United States*,[103] addressed two issues associated with the multiple award preference requirement: Whether or not the contracting officer's justification of single award was both timely and valid.

In February 1998, the GSA issued a solicitation for an IDIQ contract for various telecommunication services. The solicitation advised potential offerors that the government intended to make a single award. In June 1998, WinSTAR Communications, Inc., notified the GSA that it intended to protest the agency's decision to make a single award under the IDIQ contract. In response, the contracting officer memorialized his single award justification the following day. WinSTAR protested to the COFC.

Regarding the first issue, WinSTAR alleged that the agency decided improperly to make a single award because the contracting officer failed to document his decision until several months after the agency issued the solicitation. The protester asserted that the FAR[104] required a written determination before the agency issued the solicitation because the decision to make a single award was not a part of the agency's acquisition plan or class determination. The GSA argued that the contracting officer's determination was proper because the contracting officer complied with the FAR and made the determination before contract award.

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97. *Id*. at 3. Unfortunately, due to the redacted opinion, the exact language of the relevant provision is not available. *Id.*

98. *Id*. *See* FAR, *supra* note 17, at 16.503(a).

99. *Satellite*, 98-2 CPD ¶ 125 at 3.

100. *Id.* at 3-4. In reaching its conclusion, the GAO stated:

> In other words, an obligation that is avoidable in the government's discretion, or whenever it is in the government's interest, is no limit on the agency's actions. Where the agency has such discretion, it is impossible to ascertain any definite amount of work to which a contractor is entitled to, no guidance for a court or board to determine if and when a breach has occurred, and no means of enforcing the contract against the government.

Id.

101. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1587, 108 Stat. 3243 (codified at 41 U.S.C.A. § 253h (West 1999) and implemented at FAR 16.504(c)).

102. FAR, *supra* note 17, at 16.504(c)(2). This provision, states, in part: "[T]he contracting officer shall, to the maximum extent practicable, give preference to making multiple awards of indefinite quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources." *Id.*

103. 41 Fed. Cl. 748 (1998).

104. FAR, *supra* note 17, at 16.504(c)(1). This provision states, in part:

> The contracting officer shall, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources. In making a determination as to whether multiple awards are appropriate, the contracting officer shall exercise sound business judgment as part of acquisition planning. No written determination to make a single award is necessary when the determination is contained in a written acquisition plan or when a class determination has been made . . . .

Id.

The COFC disagreed with the GSA and ruled for WinSTAR.[105] The court concluded that the contracting officer did not follow the procedures set out in FAR 16.504(c)(1), which requires a written determination when the agency decides to structure the solicitation as a single award.[106] The court nevertheless denied WinSTAR relief based on this issue. The court held that the contracting officer's actions did not prejudice the protester because the GSA could use the same rationale for the single award determination even if the court intervened.[107]

As to the second issue, the contracting officer asserted that three of the six criteria for determining when not to make multiple awards applied to the solicitation.[108] Specifically, the contracting officer determined that a single award would provide a better price and lower the cost of contract administration. Therefore, the contracting officer concluded that multiple awards were not in the government's best interest. The court, however, stated that the contracting officer failed to consider the benefits of making multiple awards.[109] According to the court, the contracting officer focused improperly on the potential benefits of making single awards without first considering the benefits of multiple awards. Finding this approach unreasonable, the COFC sustained WinSTAR's protest on this issue.[110]

The GAO Reverses Itself, Declares Limited Protest Jurisdiction Over Task Orders

In September 1998, the GAO ruled that it did not have protest jurisdiction over task and delivery order contracts.[111] On reconsideration, however, the GAO reversed its earlier decision in *Teledyne-Commodore, LLC*,[112] and reinstated the protest.

In *Teledyne*, the Army issued a RFP for multiple award task order contracts to demilitarize and dispose of various chemical weapons. The RFP divided the work into three phases and required the multiple awardees to pass each phase before receiving the next task order.[113] Unfortunately for Teledyne, it failed to pass the second phase and did not receive a task order for the third phase. As a result, Teledyne protested its nonselection.

In its original decision, the GAO cited the FASA's jurisdictional restriction and denied Teledyne's protest.[114] On reconsideration, however, the GAO concluded that the FASA prohibition did not apply where the agency intended a single source award rather than the multiple awards contemplated under a typical IDIQ contract.[115] Contrary to its earlier decision, the GAO ruled that the Army conducted a downselection by weeding out unsatisfactory contractors.[116] The GAO noted

105. *WinSTAR*, 41 Fed. Cl. at 757-58.

106. *Id*. The court found that the FAR did not limit the requirement to make a separate written determination to circumstances in which the determination is a part of the written acquisition plan or a class determination. The court also found that the contracting officer did not make the single award decision. Rather, it was a program decision made above his level. *Id*. at 758.

107. *Id.*

108. The FAR provides, in part, that multiple awards should not be made if the contracting officer determines that:

> (i) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;
> (ii) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;
> (iii) The cost of administration of multiple contracts may outweigh any potential benefits from making multiple awards;
> (iv) The tasks likely to be ordered are so integrally related that only a single contractor can reasonably perform the work;
> (v) The total estimated value of the contract is less than the simplified acquisition threshold; or
> (vi) Multiple awards would not be in the best interests of the Government.

FAR, *supra* note 17, at 16.504(c)(1).

109. *WinSTAR*, 41 Fed. Cl. at 759.

110. *Id*. at 762.

111. Teledyne-Commodore, LLC, B-278408.3, Sept. 15, 1998, 98-2 CPD ¶ 70.

112. B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121.

113. *Id*. at 2. The RFP divided the work into three phases, each corresponding to a contract line item number (CLIN): "CLIN 0001, data gap resolution; CLIN 0002, demonstration work plan; and CLIN 0003, technology demonstration." *Id.*

114. The FASA prohibits the GAO from exercising its protest jurisdiction over task and delivery orders. One exception to this rule is where an agency conducts a downselection through the issuance of task or delivery orders. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1004, 108 Stat. 3243, 3252-53. Downselection is a "two-step procurement technique where, as a first step, the number of competitors are reduced by preliminary screening, and in the second step, a best value procurement is conducted between the remaining competitors." RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 200 (2d ed. 1998).

the Army's use of a phased procurement did not foster the type of competitive environment that the FASA intended. Because the phased procurement removed nonselected contractors from further competition, the GAO declared that it had the authority to consider the protest regarding both the competition and selection decision.[117]

Options

Government Has Discretion to Exercise an Option

In *Kirk/Marsland Advertising, Inc.*,[118] the Public Health Service (a division of the Department of Health & Human Services) awarded a firm-fixed-price contract for nurse recruitment support services to Kirk/Marsland Advertising, Inc. (K/M). The contract provided for an eighteen-month base period and two option periods. After the initial base period, the Public Health Service notified the contractor that the agency would not exercise the option because it lacked sufficient funds. Kirk/Marsland, a minority owned and operated advertising firm, took exception and responded that the agency had better find the funds to exercise the option. When this tactic failed, the contractor filed a claim for $85,346.83.[119] The contracting officer denied the claim.

In its appeal to the ASBCA, K/M sought fees and anticipated profits for both option periods. It argued that the Public Health Service acted in bad faith or, alternatively, abused its discretion in not exercising the options. The Public Health Service moved for summary judgment, which the board granted. The board ruled that the government has the discretion to decide whether or not to exercise an option under the standard FAR option clause, and this discretion presumes that the government acted in good faith. To overcome this presumption, the appellant must show that the government acted in bad faith, abused its discretion, or acted in an arbitrary or capricious manner. The board concluded that the appellant's allegations of racial discrimination and other government acts of bad faith failed to meet this high standard of proof.[120]

Contractor Hits the Roof: Claims Government Exercised Option Improperly

In an interesting case, *Alice Roofing & Sheet Metal Works, Inc.*, protested the Air Force's decision to exercise an option under American Roofing & Metal Co.'s contract.[121] Alice claimed that the Air Force determined improperly that the option exercise was the most advantageous method of satisfying its needs.[122]

On appeal, Alice claimed that the option exercise was improper because: (1) the quantities ordered were substantially below the estimated quantities[123] in the original RFP;[124] and (2) the agency did not conduct an adequate market survey or determine whether the option was the most advantageous means of meeting its requirements.[125] The GAO found the protester's arguments lacked merit for two reasons. First, the GAO found that the prices for substantially reduced quantities would result in higher prices than American's option prices.[126] Second, the GAO concluded that the Air Force complied with the FAR because the contracting officer performed an informal price and market survey analysis in arriving at her decision to exercise the option.[127]

The GAO concluded that the Air Force reasonably determined that the option exercise was the most advantageous

115. *Teledyne*, 98-2 CPD ¶ 121 at 5.

116. *See* Electro-Voice, Inc., B-278319, B-278319.2, Jan 15, 1998, 98-1 CPD ¶ 23. In *Electro-Voice*, the GAO concluded that the FASA restriction on protests of task order contracts did not apply to downselections. *Id*. at 5.

117. *Teledyne*, 98-2 CPD ¶ 121 at 5-6.

118. ASBCA No. 51075, 99-2 BCA ¶ 30,439.

119. *Id*. at 4. This amount represented the two option periods. *Id.*

120. *Id.* at 10.

121. Alice Roofing & Sheet Metal Works, Inc., B-283153, 1999 U.S. Comp. Gen. LEXIS 172 (Oct. 13, 1999). The IDIQ contract required American to provide roofing repair and replacement services at Randolph Air Force Base, Texas. The Air Force exercised the second option under the IDIQ contract when Alice protested. *Id.* at *1-*2.

122. *Id.* at *2.

123. *Id.* The Air Force's orders for the base year and first option year totaled only about $1.4 million when the total estimated work for the same period was approximately $7.7 million.

124. *Id.* Essentially, the protester argued that had the Air Force resolicited with accurate estimates, it would have received better (lower) prices. *Id*.

125. *Id. See* FAR, *supra* note 17, at 17.207(c)(3). This provision states, in part, that the contracting officer must determine "[t]he exercise of the option is the most advantageous method of fulfilling the government's need, price and other factors considered." *Id*.

method available to the agency. In reaching this conclusion, the GAO noted that the agency needed only to perform informal market survey or analysis, not detailed market research.[128]

Cooperative Agreement–CAFC Reverses COFC

In 1987, the USDA signed a cooperative agreement with Quiman, S.A., a Mexican corporation. Quiman produced fetal bovine serum (FBS), which is used to develop livestock vaccine.[129] To export FBS, Quiman applied for the Overseas Source Inspection Program (OSI).[130] The cooperative agreement required the USDA to inspect Quiman's Mexican facility to determine whether it passed the USDA standards and to keep track of the $15,000 Quiman paid the USDA for the inspections. Importers with valid permits could purchase FBS from Quiman only after USDA inspected and approved Quiman's facilities.

Between 1987 and 1989, Quiman sold FBS to U.S. importers. In July 1990, the USDA changed its policy and required all FBS imported from Mexico to undergo either safety testing or gamma-irradiation treatment. Quiman was unaware of these changes until 15 November 1990 when the USDA terminated Quiman's cooperative agreement. On 21 November 1990, Quiman requested an exemption from the safety-testing and gamma-irradiation requirement for approximately 12,000 liters of FBS. The USDA denied the request, and Quiman sued in the COFC, claiming breach of the cooperative agreement.

Quiman asserted that the cooperative agreement was an enforceable contract. Quiman argued that it provided $15,000 to the USDA to cover the cost of the inspections and approvals. In return, the USDA promised to inspect its facilities and, if the facilities passed inspection, to issue permits allowing U.S. importers to buy FBS from Quiman.

The COFC ruled against Quiman and held that the cooperative agreement with the USDA was not an enforceable contract because the parties lacked mutual intent to create a binding, legal contract.[131] The court concluded that the $15,000 Quiman gave to the USDA under the cooperative agreement only allowed Quiman to sell FBS to U.S. importers without being subjected to other treatment requirements. The court also found that the cooperative agreement was too indefinite to create an enforceable contract.[132]

On appeal, the CAFC held that Quiman's cooperative agreement was an enforceable contract.[133] The CAFC concluded that the cooperative agreement contained definite terms outlining the parties' obligations.[134] Moreover, the court opined that the USDA's agreement to provide inspectors for Quiman's facilities in exchange for the $15,000 to cover the expenses of those

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126. *Alice*, 1999 Comp. Gen. LEXIS 172, at *3. In reaching this conclusion, the GAO stated: "Rather, it is more reasonable for the agency to expect that prices for substantially reduced quantities in a new solicitation would be higher than American Roofing's option prices." *Id*. The GAO recognized that economies of scale dictate that as the quantity increases, the cost of production of the item decreases as a result of volume discounts, better management, acquisition of more efficient equipment, and greater use of by-products. *Id*. The GAO also distinguished its decision in *AAA Engineering & Drafting, Inc*. from the instant case. In *AAA*, the GAO recommended that the agency resolicit the required quantities for the option year because of substantial *increases* in the agency's requirements not decreases. AAA Eng'g & Drafting, Inc., B-236034.2, Mar. 26, 1992, 92-1 CPD ¶ 307 at 3-4, *cited in Alice*, 1999 Comp. Gen. LEXIS 172, at *3 (emphasis added).

127. *Alice*, 1999 Comp. Gen. LEXIS 172, at *4 -*5.

128. Additionally, the GAO also stated:

> We also note that the intent of the regulations concerning the exercise of options is not to afford a firm that offered high prices under an original solicitation a second chance to beat the contractor's option price. Thus, the mere fact that a protester claims that it can perform a requirement for less than the option price does not establish that exercising the option is unreasonable.

Id.

129. Quiman, S.A. de C.V. v. United States, 39 Fed. Cl. 1712 (1997). A cooperative agreement is a legal instrument between the U.S. government and a state, a local government, or other recipient. 31 U.S.C.A. § 6305 (West 1999).

130. *Id*. at 174. The Overseas Source Inspection Program is a program designed to allow an overseas company to export FBS to U.S. importers holding valid import permits after the USDA inspects and approves its facilities. *Id*.

131. *Id.* at 179.

132. *Id.*

133. Quiman, S.A. de C.V. v. United States, No. 98-5036, 1999 U.S. App. LEXIS 732 (Fed. Cir. Jan. 21, 1999). The CAFC did, however, affirm the COFC's alternative holding that the UDSA did not breach the contract because the agency had no duty to provide notice of termination of the OSI program. *Id*. at *4.

134. *Id*. at *2. The USDA argued that the cooperative agreement is not a contract because the agreement lacked several vital provisions. For example, the USDA asserted that the agreement did not include a remedy provision for breach. In dismissing this argument, the CAFC stated: "Few contract cases would be in court if contract language had articulated the parties' postbreach positions as clearly as might have been done, and the failure to specify remedies in the contract is no reason to find that the parties intended no remedy at all." *Id*.

inspections constituted adequate consideration for an enforceable contract.[135]

Sealed Bidding

While the area of negotiations has seen many changes over the last few years, such has not been the case for sealed bidding where the theme has been "steady as she goes." A recent change to the late bid rules found at FAR 14.304, however, may shake things up a bit when it comes to bids that the agency receives after bid opening. The change to the "late bid" rules should make things easier for agencies when deciding if they should accept and consider late bids. Only two late bid rules now exist to allow an agency to accept and consider a bid received after bid opening. According to the revised rule, an agency may accept and consider a bid received after bid opening but before award if: (1) the bid was transmitted through electronic commerce and was received at the initial entry point of the government infrastructure not later than 5:00 p.m. one working day before the date specified for receipt of bids, or (2) there is acceptable evidence that the government installation received and exercised exclusive control over the bid before the time set for receipt of bids.[136]

Canceling a Solicitation: Ambiguity Is in the Eye of the Beholder or Not

An agency may cancel an IFB after exposing bid prices *only* if there is a compelling reason to do so.[137] When the agency decides to cancel an IFB after bid opening because of an ambiguity, the GAO will not disturb that decision unless it is shown to be arbitrary, capricious, or unsupported by substantial evidence.[138] In *Massaro Co.; Poerio, Inc.*,[139] the GAO rejected such a decision made by the Department of Veterans Affairs (VA).

The VA solicited bids for the environmental improvement of three inpatient units at the VA Medical Center in Pittsburgh, Pennsylvania.[140] The IFB requested bidders to provide prices for two bid items and three alternates.[141] The VA received nine bids. Poerio's bid was the apparent lowest-priced bid; Massaro's bid was the apparent next lowest bid.[142] After bid opening, Massaro notified the agency that its total bid price was included in its price for bid item I. Massaro explained that it was unsure how to price items I and II based upon the IFB's requirement at Amendment 2.[143]

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135. *Id.* at *3-*4.

136. FAR, *supra* note 17, at 14.304(b)(1)(i), (ii). Before this change, the FAR contained four late bid rules: (1) the five-day rule, (2) the two-day rule, (3) the government mishandling rule, and (4) the electronic bid rule.

137. *See* FAR, *supra* note 17, at 14.404-(a)(1). *See also* Shetland Properties of Cook County Ltd. Partnership, B-225790.2, July 1, 1987, 87-2 CPD ¶ 2 at 2.

138. *See* Canadian Commercial Corp./Ballard Battery Sys. Corp., B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202 at 4.

139. B-280772.2; B-280772.3, Dec. 4, 1998, 98-2 CPD ¶ 123.

140. *Id.* at 1.

141. *Id.* The solicitation required bidders to provide prices for two bid items and three alternates that the IFB described as minor additions or deletions to the IFB's performance requirements, and a unit price for mine grouting. The two bid items included: (1) general construction work that included new construction, alterations, walks, grading, paving, drainage, mechanical and electrical work, elevators, necessary removal of existing structures and construction, and certain other items; and (2) asbestos abatement, to include asbestos in the area of the work as well as in the other selected areas (to include the work described in Alternate 2 that involved the abatement of asbestos floor tile located on the building's third floor). The VA issued Amendment 2, which stated that although the VA requested bidders to list the price for the asbestos abatement work separately on the bid form, all such work was to be included in a single prime contract that would be the general contractor's responsibility. *Id.* at 2.

142. *Id.* Peorio submitted a bid for $11,401,500 ($10,687,000 for bid item I, plus $714,500 for bid item II. Massaro's bid price was $11,586,000 ($10,886,000 for bid item I, plus $700,000 for bid item II). *Id.*

143. *Id.* Apparently, the language of Amendment 2 confused Massaro. It did not know whether the item I and II prices were to represent different portions of the overall work, so that the bidder's total price for all work under the IFB was the sum of prices I and II; or whether the price for item I represented the bid for all work under the IFB, with the item II price identifying merely the asbestos abatement related portion of the item I price. Massaro maintained that one of the agency's personnel instructed it to include the item II price in the item I price and then list separately the price for asbestos abatement work in item II. *Id.* at 2-3.

The agency requested that Massaro submit work papers to support its claim.[144] After reviewing the work papers, the contracting officer determined that Massaro included the item II price in the item I price and then listed that same price separately under item II, in essence bidding the item II price twice. After the contracting officer deducted the item II price from the overall bid, Massaro's intended bid became the lowest-priced bid, displacing Poerio's bid.[145]

Poerio protested the agency's actions before the GAO. Poerio argued that the agency allowed Massaro to submit work papers improperly after bid opening in support of its alleged intended bid. After Poerio filed its protest, the VA decided to cancel the IFB because of the IFB's ambiguous pricing terms.[146] The GAO dismissed the protest upon notice of the agency's cancellation of the IFB. Subsequently, Massaro and Poerio both protested to the GAO. Each argued that the IFB was not ambiguous, that the agency should reinstate the solicitation, and that it should receive the contract award.[147]

In its decision, the GAO agreed with the protesters' allegation that the IFB was not ambiguous. The GAO found that when read as whole, the solicitation was susceptible to only one reasonable interpretation as to what prices the agency required bidders to submit.[148] The GAO concluded that the IFB provided no reasonable basis for a bidder to conclude that its item I price should include its item II price.[149] Because the GAO determined that the IFB had only one reasonable interpretation, it found that the VA did not have a compelling reason to cancel the IFB. In sustaining the protest, the GAO recommended that the agency award the contract to Poerio as the lowest-priced responsive bidder.[150]

Responsiveness

Here's What You Asked For, Plus Some . . .

A recent case illustrates perfectly the golden rule of sealed bidding: To be responsive, a bid must contain an unequivocal offer to perform, without exception, the exact thing requested in the IFB. In *Interstate Constr., Inc*,[151] the GAO found that an agency improperly accepted a bid that modified material terms of a solicitation, limited the bidder's liability, and limited the government's contract rights.[152]

The U.S. Army Corps of Engineers (USACE), issued an IFB for the repair and upgrade of the jet fuel hydrant system and bulk fuel storage at Beale Air Force Base, California.[153] The agency received twelve bids. Kinley Construction Company submitted the apparent low bid; Interstate Construction submitted the next lowest bid.[154] In addition to responding to all the solicitation requirements, Kinley's bid included a statement that it identified as a bid "qualification."[155] Kinley's bid stated that "Bid number #9–Tanks will be cleaned and gas free by government before commencement of work."[156]

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144. *Id.* at 3. Massaro submitted undated work papers allegedly produced on the day of bid opening. *Id.*

145. *Id.* After deducting the item II price from the total bid price, Massaro's bid reflected a total price of $10,886,000. *Id.*

146. *Id.* The agency reported that the IFB's pricing requirements became ambiguous after it issued Amendment 2. *Id.*

147. *Id.* at 4. While the protesters agreed that the solicitation was not ambiguous, each protester interpreted the solicitation's pricing requirements differently. Messaro argued that the IFB required a total bid price for item I and a break-out of that price for item II. Poerio contended that the bid schedule specified two separate and distinct work requirements for which the agency required bidders to provide separate prices. *Id.*

148. *Id.* Specifically, the GAO determined that: (1) nothing in the solicitation indicated that the agency intended for one of the two identified bid items to be encompassed by the other; (2) the solicitation expressly defines two distinct, separable work efforts; (3) the bid schedule separated the two bid items clearly by providing each item a space for the bidder's price for that particular work item; and (4) Amendment 2 reiterated that the agency required separate prices for two distinct work components.

149. *Id.* The GAO stated that although Amendment 2 provided for the agency to award one prime contract that included both items I and II, nothing in the IFB allowed bidders to reasonably determine that a bidder should combine prices for both items into item I and then set out its price for item II independently. *Id.*

150. *Id.* While the GAO agreed with both protesters that the agency cancelled the solicitation properly, it found that the agency's action prejudiced Poerio because its bid was low bid, and there was no basis to accept Massaro's interpretation of the IFB's requirements. *Id.* at 5.

151. B-281465, Feb. 10, 1999, 99-1 CPD ¶ 31.

152. *Id.* at 1.

153. *Id.* In addition to the original solicitation, the agency issued four amendments. The solicitation's pricing schedule sought prices for seven basic items relating to repairs/upgrades at the Pumphouse No. 1 site, and two option items relating to repairs/upgrades at the bulk fuel storage area. Item No. 0009, one of the two option items, involved lowering the high-level shut-off valves on three bulk fuel storage tanks. *Id.*

154. *Id.* Kinley's bid price was $1,591,566 while Interstate's was $1,649,867. *Id.*

155. *Id.* at 2.

After bid opening, the agency informed Kinley that the contracting officer had rejected Kinley's bid as nonresponsive under FAR 14.404-2(d), which requires an agency to reject a bid imposing conditions that modify the IFB's requirements and the bidder's liability to the government.[157] Kinley submitted an agency-level protest, arguing that the agency was free to waive its bid qualification as a minor informality or irregularity because there was no specified condition in the IFB or its amendments that the tanks be clean and gas free. Subsequently, Kinley notified the contracting officer that it would withdraw its qualification statement. The contracting officer determined that the agency could ask Kinley to delete the qualification statement because the condition was one of form over substance.[158] Kinley withdrew its agency-level protest, and the agency awarded the contract to Kinley. Interstate then filed a protest before the GAO alleging that Kinley's bid was nonresponsive because it contained a material condition on performance. Interstate asserted that the agency improperly waived the condition that rendered Kinley's bid responsive.

In holding that the agency should not have disregarded Kinley's bid qualification, the GAO stated that a bidder cannot reserve rights or immunities not extended to all bidders by the conditions and specifications in the IFB.[159] To allow such a reservation would prevent all bidders from competing on a common basis.[160] The GAO concluded that there was only one reasonable interpretation of Kinley's qualification statement: Kinley agreed to perform the work *only if* the government cleaned and made gas free the tanks in question.[161] The GAO dismissed the agency's view about whether or not the two tasks were necessary to perform the work.[162] The GAO found instead that Kinley's qualification imposed additional obligations on the government that the IFB did not contemplate. The qualification limited the government's rights, as well as the contractor's liability, under the contract.[163] In reasserting the rule that a bid that is nonresponsive on its face cannot be made responsive,[164] the GAO found Kinley's qualification to be one of substance, not form, which rendered the bid nonresponsive.[165]

It's the Time of the (Turf) Season!

Most people think there are four seasons each year: fall, winter, spring and summer. But did you know about "turf establishment season"? In *Red John's Stone, Inc.*,[166] the GAO tackled the issue of turf establishment season and whether a bidder took exception to such a requirement.

The Department of Transportation (DOT) issued an IFB for roadway construction and other related work on the Blue Ridge Parkway in two North Carolina counties.[167] The IFB required contractors to submit a summary page with their bids on which bidders had to state the number of calendar days required to complete all work. The IFB set a construction start date of 16 November 1998[168] and included forty-two line items with such work as hot asphalt concrete pavement, pavement markings, furnishing and placing topsoil, and turf establishment.[169]

The DOT received four bids; Red John's Stone, Inc. submitted the lowest-priced bid and offered the shortest performance

156. *Id.*

157. *Id.*

158. *Id.* The contracting officer consulted with agency technical personnel and legal counsel after receiving the notification from Kinley that it was willing to withdraw the statement. The agency determined that the qualification did not render the bid nonresponsive because the tanks listed in the qualification statement did not require "cleaning" or work to make them "gas free" for the requested work to be performed. *Id.*

159. *Id.* at 2-3.

160. *Id.* at 4.

161. *Id.*

162. *Id.* at 5.

163. *Id.* The GAO found that although Kinley's qualification was ambiguous as to its meaning, one reasonably could interpret the phrase included in its bid to indicate that Kinley demanded that the tanks be fully drained of fuel, or that the tanks be free of fuel vapor. The GAO determined that such a requirement would be inconsistent with the IFB, which stated that the base will remain in full operation and, as depicted in drawings accompanying the IFB, that fuel was to be provided continuously below the tanks' floating pans by an underground pipe. *Id.* In fact, the agency's report concedes that it would be impossible to drain the tanks completely. *Id.*

164. *Id.* at 3 (citing Lathan Constr. Corp., B-250487, Feb. 5, 1993, 93-1 CPD ¶ 107 at 3-4).

165. *Id.* at 5. The GAO recommended that the agency terminate Kinley's contract and award to Interstate, if otherwise appropriate. *Id.*

166. B-280974, Dec. 14, 1998, 98-2 CPD ¶ 135.

167. *Id.* at 1. The IFB contemplated a fixed-price construction contract award based upon lowest total cost to the government. The lowest total cost would be the sum of the bid price plus the contract administrative cost ($500 per day) associated with the length of the performance period stated in the bid. *Id.*

168. *Id.* The IFB required that the performance period could not exceed 180 days for completion of all work. *Id.*

period.[170] The contracting officer requested that Red John verify its bid to ensure that it could complete the required work in the period provided in its bid.[171] Upon receipt of the requested documentation, the DOT concluded that Red John's bid took exception to the solicitation requirements and could not be performed in the time that Red John proposed. Therefore, the DOT found Red John's bid nonresponsive.[172] As a result, Red John filed a protest before the GAO.[173]

Although holding that some of the DOT's determinations concerned matters of responsibility rather than responsiveness, the GAO determined that the issue of "turf establishment" and the DOT's conclusion that Red John took exception to the "turf establishment" requirement were matters of responsiveness.[174] Looking to the IFB, the GAO stated that where permanent turf establishment is required, it must be in place to stabilize the disturbed area "no more than 14 days after" work has ceased.[175] Upon review of Red John's performance period, however, the GAO found that more than thirty-eight days would elapse from Red John's offered completion date until the first day of the growing season for turf establishment. Under these circumstances, neither Red John nor any other contractor could meet the solicitation's turf-establishment requirement. As a result, the GAO held that the agency properly rejected Red John's bid as nonresponsive for failing to comply with this material requirement.[176]

Responsibility

Union, Yes?

In what has become one of the most contentious procurement-related issues of 1999, the Clinton Administration has proposed an amendment to the FAR that could have a tremendous effect on the way the government conducts acquisitions, and more importantly, with whom. On 9 July 1999, the FAR Council published a proposed rule to "clarify" the types of contractor activity that indicate an unsatisfactory record of integrity and business ethics for purposes of pre-award responsibility determinations under FAR Part 9.[177] The proposed rule would amend the current standard for integrity and business ethics to include such activities as "persuasive evidence of the prospective contractor's lack of compliance with tax laws," as well as "substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws."[178] The proposed rule also requires that a prospective contractor have the "necessary workplace practices addressing matters such as training, worker retention,

169. *Id*. at 2. The turf establishment requirement called for seeding to be done within the growing season of 1 April to 30 September. The turf establishment item include "turf shoulders," which the agency maintained were an aesthetic component, integral to the "overall visitor experience and paramount to the overall management of the park." *Id.* at 4. Turf shoulders are designed to support a vehicle's weight. They replace paved shoulders, increase the ability of the roadway to blend in with the adjacent environment, and control erosion. *Id.*

170. *Id.* at 2. Red John offered a bid price of $299,937.55 and a performance period of 98 days. All other bids offered a performance period of 180 days. The next lowest priced bid was $342,514.75. *Id.*

171. *Id.* at 2. Red John's performance period was considerably lower that the agency's estimate. The agency requested that Red John submit a copy of its documentation, such the draft critical path method (CPM) schedule that it used to determine the contract time for the work. The GAO determined later that such a request was not proper to determine responsiveness because the CPM was not a bid document and a bid's responsiveness must be based solely on the bid documents themselves as they appear at the time of bid opening. *Id.*

172. *Id.* at 2-3. The agency found that the average temperatures for the repair areas were too low to permit placing hot asphalt concrete, painting pavement markings, and placing topsoil in accordance with the solicitation requirements. Additionally, the agency found that the seeding for turf establishment was to be performed prior to 1 April, the specified start date of growing season. *Id.* at 2.

173. *Id.* at 3. Red John alleged in its protest that its bid did not take exception to the contract requirements and that the agency's determination concerned matters of responsibility. Red John maintained that since it was a small business, a nonresponsibility determination must be approved by the Small Business Administration (SBA). *Id.*

174. *Id.* The GAO also found that the turf establishment requirement was a material, not a minor informality, as Red John argued in its protest. The GAO found the requirement to be material to the overall project and indivisible from the overall requirements. The GAO based its holding on the fact that the roadway construction could not be completed in February and turf shoulders established in April, as Red John proposed, without creating a safety hazard and possibly increasing work requirements for the agency. *Id*. at 3-4.

175. *Id.* at 5.

176. *Id.* at 5-6.

177. 64 Fed. Reg. 37,360 (1999). *See FAR Council Proposes Controversial Contractor "Blacklisting" Rule,* 41 The Gov't Contractor No. 27, at 10 (July 14, 1999). The FAR requires that purchases be made only from and contracts awarded only to *responsible* contractors. *See* FAR, *supra* note 17, at 9.103 (a). A contracting officer must make an affirmative responsibility determination prior to making actual award to a contractor. *See* FAR, *supra* note 17, at 9.103(b). A prospective awardee must have a satisfactory record of integrity and business ethics. *See* FAR, *supra* note 17, at 9.104-1(d). The proposed rule appears to be an outgrowth of Vice President Gore's pledge to organized labor over two years ago that the government will not do business with contractors that violate federal labor laws. *See generally Gore Announces Plan to Deny Contracts to Employers With Unfair Labor Practices and to Change Cost Allowability Rules*, 39 The Gov't Contractor No. 8, at 6 (Feb. 26, 1997).

and legal compliance to ensure a skilled, stable and productive work force."[179]

Customer Satisfaction Isn't Always Job Number 1!

Generally, the GAO will not review an agency's nonresponsibility determination; however, it will question that determination when a protester alleges that the agency acted in bad faith or the decision lacked a reasonable basis.[180] In *Pacific Photocopy and Research Services*,[181] the protester requested that the GAO review such a determination made by the Administrative Office of the U.S. Courts.

The Administrative Office of the U.S. Courts issued an IFB for a licensing agreement to provide copy center services for the U.S. Bankruptcy Court for the Southern District of Florida.[182] The agency received two bids, with Pacific submitting the lower-priced bid. The contracting officer conducted a responsibility determination of Pacific,[183] and discovered that the courts where Pacific had performed similar services had received written and oral complaints from the public about Pacific's service. Although two of the private references that Pacific listed provided favorable information, the contracting officer found Pacific nonresponsible and awarded the contract to the other bidder.[184]

Pacific protested to the GAO, arguing that the agency's nonresponsibility determination lacked a reasonable basis.[185] The agency maintained that because the public could obtain court documents only through the designated vendor, the vendor's conduct with the public was particularly important. The agency expressed concern that Pacific's poor past performance could tarnish the court's reputation.[186]

In finding the agency's determination to be reasonable, the GAO restated the FAR's requirement that absent information clearly indicating that a prospective contractor is responsible, the contracting officer *shall* make a nonresponsibility determination.[187] The GAO found that the contracting officer properly reviewed the information it had received regarding Pacific's current and past performance. Furthermore, ample evidence existed to support the contracting officer's decision that Pacific had a "protracted and continuous history of serious performance problems."[188] Additionally, the GAO found that Pacific did not prove that the agency had acted in bad faith in reaching its nonresponsible determination.[189]

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178. *See* 64 Fed. Reg. at 37,360. While the proposed rule would amend the FAR standard requiring a satisfactory record of integrity and business ethics, the rule does not offer guidance to assist contracting officers in determining the evidentiary level for "persuasive" evidence and "substantial" noncompliance. Furthermore, the Administration, in a background statement, suggested that a contracting officer's nonresponsibility determination need not be based on a "final adjudication" of noncompliance by a court or agency. *See Newly Proposed Contracting Standards Dealing with the "Dark Side*," 41 THE GOV'T CONTRACTOR NO. 29, at 3 (July 28, 1999).

179. *See* 64 Fed. Reg. at 37,360. As with the provisions of persuasive evidence and substantial noncompliance, the proposed rule fails to include any guidance to assist contracting officers in determining if a proposed awardee has the "necessary" practices discussed in the rule.

180. *See* Schenker Panamericana S.A., B-253029, Aug. 2, 1993, 93-2 CPD ¶ 67 at 2-3. *See also* FAR, *supra* note 17, pt. 9.

181. B-281127, Dec. 29, 1998, 98-2 CPD ¶ 164.

182. *Id.* at 1. The solicitation sought bids to provide both off-site and on-site vendor operated copy centers to furnish copying and related services to provide documents to the public for certain offices of the court. *Id.*

183. *Id.* at 2. On a previous IFB that called for the exact services as the IFB in question, Pacific submitted the lowest-priced bid. At the time of bid opening, Pacific was performing the same services for the U.S. Bankruptcy Court in the Southern District of Florida as those described in the IFB. Pacific also had performed similar services for the U.S. District Court in the Southern District of Florida and the U.S. Bankruptcy Court in the Middle District of Florida. The contracting officer contacted the court clerks where Pacific had performed. Each of the clerks told the contracting officer that they had received "a constant stream of verbal and written complaints from the public" about Pacific's performance. *Id.* The complaints primarily concerned Pacific's billing practices, the lack of professionalism of Pacific's staff, and the timeliness of providing requested documents to the public The contracting officer concluded that Pacific had breached the terms of the licensing agreement consistently despite notices of such breach from the courts' clerks. The contracting officer determined that Pacific was nonresponsible and awarded the contract to the next lowest-priced bidder. *Id.* at 3.

184. *Id.* The contracting officer determined that Pacific's performance with the federal courts was more relevant to the responsibility determination than the information that the private references provided because the present solicitation provided for the same services that Pacific performed for the other federal courts. *Id.*

185. *Id.* Specifically, Pacific maintained that the determination contained generalities and unsupported attributions. Pacific responded to each complaint in the agency's report to the GAO. Pacific contended that it had no serious performance problems and that the agency should have expected some complaints due to its large volume of business. *Id.*

186. *Id.* In particular, Pacific's billing practices concerned the agency. The agency maintained that, despite the numerous complaints about and notices to Pacific about the public's dissatisfaction, Pacific failed to correct the cited deficiencies and the complaints persisted. *Id.*

187. *Id. See* FAR, *supra* note 17, at 9.103(b). Additionally, an agency will presume a contractor to be nonresponsible if that contractor is, or recently has been, seriously deficient in contract performance. *Id* at 9.104-3(b).

188. *Pacific Photocopy*, 98-2 CPD ¶ 164 at 3. The GAO concluded that while Pacific attempted to interpret favorably its past performance, such explanations and interpretations did not alter the ample amount of contrary evidence that existed. *Id.*

Negotiated Acquisitions

Regulatory Changes

On 14 October 1998, the DOD revised DFARS Part 215[190] to incorporate the recent FAR Part 15 amendments. The new DFARS Part 215 made five significant changes. First, the new DFARS Part 215 removed the four-step and alternate source selection processes based on the new guidance in FAR 15.101.[191] Second, the new DFARS Part 215 removed the approval requirements for multiple best and final offers based on the new guidance in FAR 15.307(b).[192] Third, the new DFARS Part 215 revised the guidance on cost realism analysis based on the new guidance in FAR 15.404-1(d).[193] Fourth, the new DFARS Part 215 added thresholds for requesting field pricing assistance after the FAR deleted them.[194] Finally, the new DFARS Part 215 removed the standard content requirements for field pricing reports after the FAR deleted them.

On 23 June 1999, the Army followed suit by issuing a new AFARS Part 15.[195] The Army, however, wanted to avoid restating FAR and DFARS policies and duplicating public documents that provide detailed "how-to" information. As a result, the new AFARS Part 15: (1) deleted Appendix AA, Formal Source Selection, in its entirety;[196] and (2) recommended that Army personnel use the new Army Material Command (AMC) guide on best value contracting.[197]

Agency Properly Eliminated from Competitive Range Offeror Whose Proposal Exceeded Page Limitation[198]

During the past year, the GAO revisited its previous stance regarding the impact of the FAR Part 15 rewrite on the competitive range determination. In *Clean Service Co., Inc.*,[199] the Army issued a RFP to remove cooking waste at Fort Lewis, Washington. The RFP indicated that the Army would award the contract to the offeror that submitted the best overall proposal based on three factors: (1) technical (quality); (2) past

189. *Id.* at 4-5. The GAO stated that to prove bad faith the protester must show that the agency directed its actions with the specific and malicious intent to injure the protester. Pacific did not meet this burden; therefore, the GAO determined Pacific's allegation to be unfounded. *Id.*

190. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP., pt. 215 (Apr. 1, 1984) [hereinafter DFARS].

191. The FAR now recognizes that there is a best value continuum and an agency may have to use one or more source selection approaches to obtain the best value. FAR, *supra* note 17, at 15.101.

192. FAR 15.307(b) states that:

> The contracting officer may request or allow proposal revisions to clarify and document understandings reached during negotiations. At the conclusion of discussions, each offer still in the competitive range shall be given an opportunity to submit a final proposal revision. The contracting officer is required to establish a common cut-off date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions shall be in writing and that the Government intends to make award without obtaining further revisions.

Id. at 15.307(b).

193. DFARS 215.404-1(d) now states that:

> The contracting officer should determine what information other than cost or pricing data is necessary for the cost realism analysis during acquisition planing and development of the solicitation. Unless such information is available from sources other than the offerors . . . the contracting officer will need to request data from the offerors. The contracting officer–
> (i) Shall request only necessary data; and
> (ii) May not request submission of cost or pricing data.

DFARS, *supra* note 190, at 215.404-1(d). *See* FAR, *supra* note 17, at 15.402, 15.404.

194. DFARS 215.404-2(a)(i) states that:

> The contracting officer should consider requesting field pricing assistance for–
> (A) Fixed-price proposals exceeding the cost or pricing data threshold;
> (B) Cost-type proposals exceeding the cost or pricing data threshold from offerors with significant estimating system deficiencies . . . or
> (C) Cost-type proposals exceeding $10 million from offerors without significant estimating system deficiencies.

Id. See FAR, *supra* note 17, at 15.404.

195. U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP., pt. 15 (Dec. 1, 1984).

196. *Id.* Although the Army deleted Appendix AA, the Army included some of the same language in the new AFARS Part 15. *Id*.

197. U.S. ARMY MATERIEL COMMAND, PAM. 715-3, CONTRACTING FOR BEST VALUE: A BEST PRACTICES GUIDE TO SOURCE SELECTION (1 Jan. 98).

performance; and (3) price. The RFP, however, restricted the size of an offeror's technical proposal to twenty printed pages.

Clean Service Company, Inc., Calixto, and Action Service Company submitted timely proposals. The Army rated Clean Service's proposal excellent with a score of 406 points, Calixto's proposal satisfactory with a score of 374 points, and Action's proposal "susceptible of being made acceptable" with a score of 336 points. Based on these scores, the Army decided to award the contract to Clean Service. In response, Action, which had submitted the lowest-priced offer, filed a size status protest.[200]

While the size status protest was pending, an Army attorney noticed that Clean Service's technical proposal was thirty-eight pages long. As a result, the Army reevaluated Clean Service's proposal based on the first twenty pages and reduced the competitive range to one proposal.[201] The Army then held discussions with, and ultimately awarded the contract to, Action. Clean Service protested.[202]

In determining whether the Army's actions in this case were proper, the GAO began its analysis by noting that the Army's decision to reevaluate Clean Service's proposal without the last eighteen pages was reasonable and consistent with the RFP.[203] The GAO then observed that nothing in the FAR Part 15 rewrite requires an agency to retain a proposal in the competitive range "simply to avoid a competitive range of one."[204] Likewise, nothing in FAR Part 15 requires an agency to retain in the competitive range a proposal that has no reasonable chance of winning.[205] Finally, the GAO pointed out that the Army did not have to amend the RFP to eliminate the page limit or hold discussions with Clean Service. Clean Service assumed the risk that the Army would eliminate its proposal from the competitive range when it chose to ignore the page limitation, and the Army reasonably decided to consider only the first twenty pages of Clean Service's proposal, which required major revisions. The Army's decision to limit the competitive range to Action's proposal was "reasonable and well within the broad discretion afforded to an agency in taking corrective action to ensure a fair and impartial competition."[206]

Conducting Discussions

The GAO and the COFC also decided several "discussion" cases. Some of the cases dealt with the impact of the FAR Part 15 rewrite on the government's obligation to conduct meaningful discussions, some dealt with the distinction between meaningful and misleading or deficient discussions, and some dealt with allegations of price auctioning.

Agency Not Required to "Spoon-Feed" Offeror

In *Du & Associates, Inc.*,[207] the Department of Housing and Urban Development (HUD) issued a RFP for multifamily real estate assessment and analysis services for five separate geographic regions. The RFP indicated that the HUD would award five fixed-price, indefinite-quantity contracts (one per geographic region) on a best value basis.[208] The RFP further indicated that the HUD would consider three technical factors in

198. FAR 15.306(c)(1) states that:

> Agencies shall evaluate all proposals in accordance with 15.305(a), and, if discussions are to be conducted, establish the competitive range. Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency.

FAR, *supra* note 17, at 15.306(c)(1).

199. B-281141.3, Feb. 16, 1999, 99-1 CPD ¶ 36.

200. An offeror may protest another offeror's representation that it meets the size standards required to qualify as a small business concern for a specific solicitation. FAR, *supra* note 17, at 19.301. *See id*. at 19.001 (defining a small business concern; *id*. at 19.301 (discussing the representation an offeror must submit); *see also id*. subpt. 19.1 (discussing applicable size standards).

201. *Clean Serv.*, 99-1 CPD ¶ 36 at 3. The Army eliminated Clean Service's proposal because its technical proposal, which garnered only 233 points during the reevaluation, was unacceptable, and the Army eliminated Calixto's proposal because its price proposal was unreasonable. *Id.*

202. *Id.* Clean Service initially protested to the agency. Then, after the agency denied its protest, Clean Service protested to the GAO. *Id*.

203. *Id.*

204. *Id.* at 3.

205. *Id.* (citing SDS Petroleum Prod., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59).

206. *Id. Cf.* Electronic Design, Inc., B-279662.2, B-279662.3, B-279662.4, Aug 31, 1998, 98-2 CPD ¶ 69.

207. B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156.

208. *Id.* at 1. In making its best value determination, the RFP indicated that HUD would consider technical merit first and price second. *Id*.

making its award decision: (1) prior experience (fifty points); (2) past performance (forty points); and (3) management capability and quality control (thirty points).

Nineteen offerors submitted timely proposals, and the contracting officer established a competitive range for each geographic region.[209] The contracting officer then conducted discussions with the offerors in the competitive ranges. The contracting officer conducted the face-to-face discussions with Du & Associates, Inc. (D&A) on 1 July 1998, followed by a telephone conversation that evening.[210] During the face-to-face discussions, the contracting officer gave D&A several written discussion questions. Two of these questions focused specifically on D&A's capacity and financial ability to perform the contracts.[211]

After the technical evaluation panel (TEP) evaluated the revised proposals, the contracting officer reduced the competitive range to the two offerors that had submitted the most highly rated proposals for all five geographic regions. Du & Associates, Inc., did not make the cut, and the contracting officer awarded the contract to one of the offerors in the final competitive range.

The contracting officer later advised D&A in a written debriefing letter that it had received a lower technical score because of significant weaknesses or deficiencies in its "Prior Experience" and "Management Capability and Quality Control." In response, D&A filed a protest alleging, *inter alia*, that the discussions were deficient because the contracting officer did not convey adequately HUD's concerns about the experience of its key personnel and its ability to manage its proposed subcontractors.[212]

The GAO began its analysis by focusing on the FAR Part 15 rewrite and its impact on the government's obligation to conduct meaningful discussions. In so doing, the GAO noted FAR 15.306(d)(3) arguably requires the contracting officer to discuss every aspect of a proposal that an offeror could revise to improve its proposal. The GAO, however, did not believe that the FAR Part 15 rewrite changed the legal requirements for discussions, or limited the contracting officer's discretion to determine their contents. The GAO consequently concluded that a contracting officer is not required to "spoon feed" an offeror.[213] Instead, the GAO held that a contracting officer is required only to lead an offeror "into areas of its proposal that require amplification or revision,"[214] which the contracting officer did in this particular case.[215]

Agency Misled Offeror by Allowing It to Believe It Could Perform Contract Work at Remote Facility

In *Metro Machine Corp.*,[216] the Navy issued a RFP for dry-docking and repair services for approximately twenty-two Navy ships based at the Mayport Naval Station near Jacksonville, Florida. The RFP advised offerors that the Navy would evaluate six non-price factors.[217] In addition, the RFP informed

209. *Id.* at 2. The contracting officer included D&A in the competitive range in each geographic region. *Id*.

210. *Id.* at 4. Du & Associates, Inc., alleged that the contracting officer advised its representative to rely solely on the written discussion questions to prepare its revised proposal; however, the GAO discounted D&A's allegation for three reasons. First, the contracting officer denied the allegation and testified that he used the written questions to structure the oral discussions. Second, D&A failed to produce credible evidence to support its claim. Finally, the GAO concluded that the allegation was implausible because such an instruction would have made the oral discussions meaningless. *Id.*

211. *Id.* at 3. The contracting officer submitted several written questions to D&A, including the following:

> 1. We realize that [D&A] is a newly form[ed] company. Please provide assurance that the company has the capacity and financial ability to perform the contract.
>
> . . . .
>
> 4. It is our concern that the costs reflect the understanding of the solicitation and tasks that will be required by the contractor. Please provide a breakdown of costs supporting your proposed fees to assure that adequate resources will be dedicated to the contract(s).

Id.

212. *Id.* at 3. Du & Associates, Inc., also alleged that the HUD misevaluated its proposal by ignoring its contents and failing to comply with the stated evaluation factors; however, the GAO rejected those arguments summarily. *Id.* at 4-5.

213. *Id.* at 7. In other words, the FAR Part 15 rewrite does not require the contracting officer to point out every aspect of a proposal that the offeror could improve, particularly when the evaluation criteria and instructions in the RFP clearly advise the offeror of the government's requirements and expectations. *Id.*

214. *Id. See* MCR Fed., Inc., B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8 (stating that "the revised Part 15 language [does not] change the legal standard so as to require discussion of all proposal areas where ratings could be improved"). *But see* Cotton & Co., B-282808, 1999 U.S. Comp. Gen. LEXIS 163 (Aug. 30, 1999) (sustaining a protest where the agency failed to: (1) identify clearly deficiencies in the protester's proposal, and (2) respond to the protester's clear misunderstanding of the agency's concerns during oral discussions).

215. *Du & Assocs*., 98-2 CPD ¶ 156 at 7. The GAO concluded that the oral and written discussions, combined with the information in the RFP, were sufficient to lead D&A into the areas of its proposal that concerned the HUD. *Id.*

offerors that they could either use a government-furnished dry dock or supply their own.

Metro Machine and Atlantic Dry Dock (ADD) submitted timely proposals. Metro planned to lease a site from the Jacksonville Port Authority and use its own dry dock to perform the actual repairs; however, Metro planned to perform the production shop work at its Norfolk, Virginia, facility. In contrast, ADD planned to use the government-furnished dry dock and perform all the required work at its Jacksonville facility.

On 17 July 1998, the contracting officer sent written discussion questions to both offerors. Unfortunately, the questions the Navy sent to Metro did not advise Metro properly of the Navy's concerns about its plan to use its Norfolk facility. The Navy asked Metro to explain how it planned to mitigate any problems the physical distance between Jacksonville and Norfolk would cause, but the Navy never told Metro that its plan to use the Norfolk facility was unacceptable. The Navy then awarded the contract to ADD.[218]

Metro protested, alleging that the Navy's discussions were materially misleading. The GAO agreed. The source selection authority (SSA) believed that the RFP required offerors to establish production and support facilities near Jacksonville.[219] As a result, the Navy should have told Metro that it would have to change its proposed approach instead of implying that Metro could simply explain or enhance its plan to use its Norfolk facility. Because the Navy failed to do so, its discussions with Metro were not meaningful.[220]

Agency Did Not Conduct an Improper "Price Auction" by Advising an Offeror that Its Price Was Too High

In *Nick Chorak Mowing*,[221] the protester alleged that the EPA conducted an improper "price auction" when it advised the successful offeror that its price was too high. The GAO disagreed.

The EPA issued a RFQ for landscape services at two environmental laboratories in Corvallis, Oregon, on 26 March 1998. Nick Chorak Mowing and Bill Christopher Enterprises submitted quotations, and the EPA conducted discussions with both. During discussions, the contracting officer sent Bill Christopher Enterprises a facsimile that included the following postscript: "P.S. Your quote is more than what we had in mind for this effort. I'd like to discuss your offer."[222] Bill Christopher Enterprises responded by reducing its original quote by $1000, and the contracting officer issued it a purchase order after concluding that its higher quotation represented the best value to the government.[223]

The GAO responded to the protester's allegation that the EPA had conducted an improper "price auction" by distinguishing between the previous version of FAR Part 15 and the current version.[224] The previous version of Part 15 specifically prohibited price auctioning; however, the current version merely prohibits government personnel from revealing another offeror's price without that offeror's permission. Today, a contracting officer may advise an offeror that its price is too high or too low, and reveal the results of the analysis that supports the contracting officer's conclusion. In addition, a contracting officer may reveal the cost or price that the government considers reasonable based on its price analysis, market research, and other reviews. As a result, the GAO concluded that the EPA's

216. B-281872.2, B-281872.3, B-281872.4, 1999 Comp. Gen. LEXIS 90 (Apr. 22, 1999).

217. *Id.* at *4. The Navy intended to evaluate two of the non-price factors (i.e., facility site requirements and contractor-furnished dry-dock requirement) on a pass/fail basis, and the other four (i.e., technical, earliest date able to commence dry-dock operations, environmental impact, and past performance) in descending order of importance. *Id.*

218. *Id.* at *9. The Navy did not conduct a cost-technical trade-off between Metro's proposal and ADD's proposal because it found Metro's proposal unacceptable. *Id.* at *3.

219. *Id.* at *14. The source selection authority believed the RFP imposed a 75-mile radius and 90-minute commute requirement on all production and support facilities, even though the distance requirements applied only to the mooring location for the dry dock. *Id.*

220. *Id.* at *15. *See* ACS Gov't Solutions Group, Inc., B-282098, B-282098.2, B-282098.3, June 2, 1999, 99-1 CPD ¶ 106 (sustaining a protest where the agency had concerns about the protester's pricing strategy, but failed to give the protester an opportunity to explain it during discussions); *cf.* KBM Group, Inc., B-281919, B-281919.2 1999 U.S. Comp. Gen. LEXIS 107 (May 3, 1999) (concluding that the agency did not have to: (1) tell the protester that its price was higher than the awardee's because the agency did not consider its price too high, or (2) hold technical discussions with the protester because its initial proposal contained no weaknesses); I.T.S. Corp., B-280431, Sept. 29, 1998, 98-2 CPD ¶ 89 (concluding that the Air Force did not conduct "prejudicially unequal discussions" by questioning some offerors about their proposed staffing levels during both rounds of discussions because the Air Force equalized the offerors' positions before the second round of discussions).

221. B-280011.2, Oct. 1, 1998, 98-2 CPD ¶ 82.

222. *Id.* at 2.

223. *Id.* Before issuing the purchase order, the contracting officer amended the RFQ in response to one of Bill Christopher Enterprises' suggestions. The amendment reduced the number of annual fertilizer applications from three to two and invited both offerors to submit revised proposals. *Id.*

224. *Id.* at 3.

discussions with Bill Christopher Enterprises were proper because the contracting officer did not reveal either offeror's quote to the other.[225] The contracting officer merely advised Bill Christopher Enterprises that the EPA considered its price too high.[226]

Evaluating Proposals

Consideration of Unstated Life-Cycle Costs Improper

In *Marquette Medical Systems, Inc.*,[227] the Army issued a RFP for a Cardiology Medical Information System (CMIS) that would permit the Army to store, retrieve, and interpret electrocardiograms (ECG) at fifteen major medical centers and approximately 200 hospitals and medical clinics throughout the United States. One piece of the CMIS was the ECG carts. Among other things, the RFP advised potential offerors that the Army already had 950 ECG carts, which offerors could either upgrade or replace. In addition, the RFP advised offerors that the Army would award a fixed-price contract to the offeror whose proposal represented the best overall value to the government.[228] Three offerors submitted proposals, and the Army conducted discussions with all three offerors. Unfortunately, this was only the beginning of a long and painful process that resulted in repeated rounds of discussions and protests.

Following the initial round of discussions, Hewlett-Packard Company protested the Army's decision to award the contract to Marquette Medical Systems, Inc. Hewlett-Packard alleged that Marquette's proposed equipment did not meet the RFP's minimum requirements, and the Army agreed. As a result, the Army amended the RFP and reopened discussions. It then conducted two more rounds of discussions and modified its award decision. This time, the Army decided to award the contract to Hewlett-Packard, but Marquette protested. Like Hewlett-Packard, Marquette alleged that Hewlett-Packard's proposal did not meet the RFP's minimum requirements. Again, the Army agreed and reopened discussions;[229] however, the Army decided ultimately to award the contract to Hewlett-Packard.

Unfortunately, the contracting officer "normalized" the prices before selecting Hewlett-Packard's proposal for award. Depending on whether the offeror planned to upgrade existing carts or provide new carts, the contracting officer either added to or subtracted from each offeror's proposed price.[230] This was improper for two reasons. First, the RFP did not advise offerors that the Army intended to evaluate life-cycle costs, or penalize offerors for proposing to upgrade existing carts. Second, the contracting officer double-counted the cost difference between the offerors' proposals.[231] Therefore, the GAO sustained Marquette's protest.[232]

Non-Compliant Proposals

The GAO and the COFC both sustained protests where the agency tried to award a contract to an offeror that submitted a non-compliant proposal.

Navy's Decision to Award Contract Improper Despite Ambiguities and "Serious Concerns"

In *GTS Duratek, Inc.*,[233] the protester challenged the Navy's decision to award a contract to reduce and dispose of radioac-

225. *Id.*

226. *Id. Cf.* Spectrofuge Corp. of North Carolina, Inc. – Recon., B-281030.3, Apr. 9, 1999, 99-1 CPD ¶ 65.

227. B-277827.5, B277827.7, Apr. 29, 1999, 99-1 CPD ¶ 90.

228. *Id*. at 2. The RFP defined the best overall value as the proposal with the highest technical merit and a realistic price. The RFP listed the following technical evaluation factors in descending order of importance: (1) quality of technical approach, (2) contract management, (3) understanding of overall contract requirements, (4) past performance and relevant experience, and (5) key personnel qualifications. The RFP then stated that the technical evaluation factors were more important than price. *Id*.

229. *Id*. at 4. After the Army decided to reopen discussions, Hewlett-Packard filed suit in the COFC to prevent the disclosure of its prices; however, the COFC allowed the Army to proceed. *Id.*

230. *Id*. at 5. The contracting officer increased Marquette's proposed price because Marquette offered to upgrade existing carts. In contrast, the contracting officer decreased Hewlett-Packard's proposed price because Hewlett-Packard offered to supply new carts. *Id*.

231. *Id.* at 7-8. The GAO found that the contracting officer double-counted the cost difference by adding to the cost of Marquette's proposed price at the same time he was subtracting from Hewlett-Packard's proposed price. The GAO then indicated that "[b]oth aspects of the double counting were problematic." *Id.* Increasing Marquette's proposed price also was improper because the contracting officer did not know how many carts Marquette would have to replace over the life of the contract. Decreasing Hewlett-Packard's proposed price was improper because: (1) the Army ultimately would end up paying for the new carts, and (2) the Army simply could not ignore the costs associated with a proposed approach that amassed the highest technical score. *Id*. at 8.

232. *Id*. at 8. *Cf.* Interlog, Inc., B-282139, Apr. 27, 1999, 99-1 CPD ¶ 87 (rejecting the protester's claim that the government considered an unstated evaluation factor and upholding an evaluation scheme under a best value procurement in which the government reserved additional points for proposals that exceeded the RFP's minimum requirements); Farnham Sec., Inc., B-280959.5, 1999 U.S. Comp. Gen. LEXIS (Feb. 9, 1999) (permitting the government to apply detailed evaluation factors not expressly stated in the RFP where the correlation between the stated factors and the detailed factors was sufficient to place offerors on notice of the evaluation criteria the government planned to apply).

tive waste to an offeror who submitted an ambiguous proposal. The RFP specifically required offerors to process all metals through a radioactive foundry and recycle them to qualified users. Yet, Allied Technology Group, Inc. (ATG) failed to demonstrate its intent to comply with this requirement. Instead, ATG expressed an intent periodically to process some metals through a commercial (non-radioactive) foundry.[234]

The GAO held that it was unreasonable for the Navy to conclude that ATG's proposal was acceptable for two reasons. First, the Navy could not tell whether ATG intended to comply with the requirement to process all metals through a radioactive foundry because the statements in ATG's various proposals created an ambiguity that the Navy failed to resolve. Second, the Navy expressed "serious concerns" about ATG's ability to recycle the reduced metals.[235] Therefore, the GAO sustained the protest.[236]

Failure to Follow FAR Procedures for Accepting Innovative, but Non-Compliant Proposal Improper

In *Beta Analytics International, Inc. v. United States*,[237] the State Department issued a RFP for security monitoring services at various overseas and domestic construction sites. The RFP required offerors to provide two types of Construction Security Personnel (CSP) with distinct duties and qualifications;[238] however, the RFP also encouraged offerors to provide "creative or innovative approaches."[239]

Four offerors submitted timely proposals, which the TEP evaluated and scored. HSI received the highest technical score, while Beta Analytics International, Inc. received the second highest technical score.[240] The State Department then decided to award the contract to HSI, even though HSI's proposed price was $600,000 higher than Beta's proposed price.

In sustaining Beta's subsequent protest, the COFC focused on HSI's innovative management approach.[241] The court found that HSI's proposal was facially non-compliant because it proposed alterations prohibited by the RFP and the instructions provided at the pre-proposal conference."[242] The court sustained Beta's protest, holding that the State Department placed the other offerors at a disadvantage by accepting HSI's non-complaint proposal.[243]

Agency Erred in Awarding Contract to Lower-Priced Offeror Without Conducting a Proper Cost-Technical Trade-Off

In *MCR Federal, Inc.*,[244] the Defense Finance and Accounting Service (DFAS) issued a RFP for contract reconciliation

233. B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130.

234. *Id*. at 5-9. The redacted opinion makes it difficult to tell what ATG offered in each of its twelve revised proposals; however, it appears that ATG failed to demonstrate clearly its intent to comply with the requirement to process all metals through a radioactive foundry in at least three of its proposals. *Id*. at 9.

235. *Id*. at 8-9. In its eleventh revised proposal, ATG proposed two recycling options. First, ATG proposed recycling some of the processed metal itself. Second, ATG proposed sending some of the processed metal to two "potential" Department of Energy (DOE) facilities. Yet, ATG failed to address the Navy's concerns in its twelfth revised proposal. Instead, ATG continued to insist that its self-recycling option was legitimate and its ability to recycle to DOE equaled its competitor's ability to do so. *Id*.

236. *Id*. at 12. *See* Rel-Tek Sys. & Design, Inc., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2 (concluding that the Defense Finance and Accounting Service's decision to award a software contract to an offeror whose proposal was ambiguous and proposed non-complaint acceptance, warranty, and performance terms was improper). The GAO also sustained the protest in *GTS Duratek* because the Navy failed to evaluate the offerors' past performance properly. *GTS Duratek*, 98-2 CPD ¶ 130 at 12-16.

237. 44 Fed. Cl. 131 (1999).

238. *Id*. at 133. The RFP required offerors to provide Cleared American Guards (CAGs) and Construction Surveillance Technicians (CSTs). The RFP required the CAGs to control perimeter and internal access to a construction site, control secure storage areas, and provide personnel and material escort services to and around a construction site. The RFP then required CSTs to "surveil uncleared workers during designated phases of construction; x-ray and inspect material, equipment and furnishings designated for use within controlled Access Areas of a construction site; and assist in the random selection of materials required for construction and installation." *Id*.

239. *Id.* at 134.

240. *Id.* The State Department evaluated offerors' technical proposals based on the following evaluation scheme: Management Plan (30 points), Resumes of Proposed Key Personnel (30 points), Contractor's Past Performance (30 points), Total (90 points). *Id*. HSI received 84 points for its technical proposal, and Beta received 68 points. *Id*.

241. *Id*. at 139. HSI proposed combining the hours for two labor categories and consolidating the functions of two supervisory labor categories. *See Bid Protests: COFC Sustains Protest, Says Awardee's Proposal Didn't Meet Mandatory Provision*, Fed. Cont. Daily (BNA) (July 6, 1999), *available in* LEXIS News Library, BNAFCD file.

242. *Beta Analytics*, 44 Fed. Cl. at 139. Section B.3 of the RFP required offerors to provide four labor categories and prohibited them from "exceed[ing] the total estimated number of labor hours, per labor category, without prior written approval of a Contracting Officer." *Id.* at 138. In addition, the State Department advised offerors at the pre-proposal conference that: "The 'Number of Hours' in the specified labor categories in Section B may not be changed." *Id*.

services.[245] The RFP described the evaluation factors and stated that the DFAS would award multiple contracts to the offerors who submitted the most advantageous proposals. The RFP indicated that the DFAS would specifically evaluate the following three technical factors in descending order of importance: (1) technical approach,[246] (2) key personnel, and (3) management plan. In addition, the RFP indicated that the DFAS would evaluate past performance, which was equal in importance to technical approach. Finally, the RFP indicated that the DFAS would consider price, even though the non-cost factors (that is, the technical factors and past performance) were significantly more important.

Seven offerors submitted timely proposals, and the DFAS conducted written discussions with the five offerors it included in the competitive range. The DFAS then received and evaluated the offerors' final proposal revisions. Based on these evaluations, the contracting officer ranked the proposals for technical merit and best overall value. The contracting officer ranked KPMG Peat Marwick (KPMG) second, PricewaterhouseCoopers (PWC) third, and MCR Federal, Inc. (MCR) fourth for technical merit. The contracting officer then ranked KPMG first, PWC second, and MCR third for best overall value. Unfortunately, the contracting officer's rationale for these rankings was sketchy and unsound. For example, the contracting officer relied on PWC's "Better" rating[247] for "Overall Understanding and Approach" to rank it higher than MCR for technical merit, even though MCR received a "Better" rating for a more important evaluation factor ("Key Personnel").[248] As a result, MCR protested when the SSA adopted the contracting officer's rankings and decided to award the contracts to KPMG and PWC.[249]

MCR challenged the SSA's conclusion that PWC's proposal was technically superior to MCR's proposal, and the GAO agreed.[250] In so doing, the GAO reiterated the general rule that an agency must adhere to the evaluation criteria set forth in the RFP. If an agency states that technical merit is more important than price, the agency must justify its decision to select a lower-priced proposal over a technically superior proposal. In this case, the GAO stated that the DFAS could have adopted one of two approaches legitimately. The DFAS could have found that the proposals were technically comparable and awarded the contract to PWC based on its lower price, or the DFAS could have concluded that MCR's technical superiority was not worth paying its higher price. The DFAS, however, did not adopt either approach. Instead, the contracting officer ranked the proposals in a manner that was "squarely inconsistent" with the stated evaluation criteria,[251] and the SSA made the award decision without discussing how he compared the proposals, or what effect the price differential between the proposals had on the cost-technical trade-off. The GAO consequently sustained the protest.[252]

Agency's Failure to Consider Price Did Not Justify Overturning Award

Both the GAO and the COFC refused to overturn award decisions for minor evaluation errors during the past year. In *RTF/TCI/EAI Joint Venture*,[253] the GAO questioned the Army's decision to award a contract for the disposal and decontamination of government property at the Longhorn Army Ammunition Plant (LHAAP) without considering the offerors' proposed prices. The GAO, however, refused to overturn the award because the protester could not show that the Army's error prejudiced it.

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243. *Id*. at 139. The court noted that the State Department legitimately could have amended the RFP to relax the Section B requirements and allowed all of the offerors to amend their proposals; however, the State Department failed to do so. *Id*. *See* FAR, *supra* note 17, at 15.206(d) (stating that the contracting officer should amend the solicitation if: (1) the government receives an interesting, but non-compliant proposal, and (2) the contracting officer can amend the proposal without revealing protected information).

244. B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8.

245. *Id*. at 1. The contract required the contractor to "reconcile accounting, finance and contractual records, including out-of-balance conditions, problem financial records, and contract close-out requirements." *Id*. at n.1.

246. *Id*. at 2. The "technical approach" factor included two subfactors and stated that the "Sample Tasks" subfactor was "substantially more important" than the "Overall Understanding and Approach" subfactor. *Id*.

247. *Id*. at 4. The RFP indicated that a "Better" rating for technical merit meant that the proposal "fully meets all solicitation requirements and significantly exceeds may of the solicitation requirements," and a "Better" rating for past performance meant that "very little risk is anticipated." *Id*. at 2-3 n.2, n.3.

248. *Id.* at 4. According to the GAO, the contracting officer provided no real rationale for the best overall value ranking. *Id*. at 4, 6.

249. *Id.* at 4. The SSA awarded the contracts without providing any additional comments about the relative merits of the proposals. *Id*.

250. *Id*. at 4-5. MCR did not challenge the SSA's decision to award a contract to KPMG, which submitted a technically superior, lower-priced proposal. *Id*. at 9 n.8.

251. *Id.* at 6.

252. *Id.* at 7. MCR challenged several additional aspects of the procurement process; however, the GAO refused to sustain the protest on these bases. *Id.* at 7-12.

253. B-280422.3, Dec. 29, 1998, 98-2 CPD ¶ 162.

Four offerors submitted timely proposals, and the Army included three of the offerors in the competitive range. Each offeror then made a one-hour oral presentation and participated in a one-hour question and answer period,[254] which the Army videotaped. The evaluation team gave RTF/TCI/EAI Joint Venture (RTF) 80.25 points for its oral presentation, and it gave Earth Tech, Inc. 90.9 points.[255] The Army then decided to award the contract to Earth Tech.

After being debriefed, RTF filed its first protest. RTF alleged that the Army's evaluators were biased against it and had evaluated its oral presentation improperly by failing to consider its written proposal. In response, the Army selected a new evaluation team. The new evaluation team, however, only reviewed the offerors' technical plans and oral presentation videotapes. The team did not review the offerors' experience, past performance, or price. As a result, RTF filed a second protest after the Army again decided to award the contract to Earth Tech.[256]

RTF made five allegations in its protest. First, RTF alleged that the reevaluation was improper because the new evaluators did not have all of the offerors' non-price materials. Second, RTF alleged that the new evaluators misunderstood its proposal. Third, RTF alleged that the new evaluators were biased against it. Fourth, RTF alleged that Earth Tech's proposal was non-compliant because it did not obligate Earth Tech specifically to comply with all RFP requirements. Finally, RTF alleged that the agency should have conducted a separate price reasonableness evaluation in light of the significant differences between Earth Tech's proposed price and RTF's proposed price.

The GAO rejected RTF's first four allegations summarily;[257] however, the GAO had serious concerns about the Army's evaluation scheme and ultimate award decision. The GAO noted that the CICA requires the government to consider cost or price in every source selection.[258] As a result, the Army's evaluation scheme was faulty since it limited the price evaluation to the first step in the process.[259] In addition, the Army's ultimate award decision was improper since the Army failed to consider price specifically.

The GAO nevertheless denied RTF's protest because RTF could not show that the Army's error prejudiced it. The GAO noted that Earth Tech's proposal was the highest-scored, lowest-priced proposal. Therefore, the Army did not need to perform a cost-technical trade-off to show that Earth Tech's proposal represented the best value.[260]

The CAFC Provides Guidance on the "Substantial Chance" Test

In *Alfa Laval Separation, Inc. v. United States*,[261] the CAFC provided guidance regarding how to apply the "substantial chance" test to determine prejudice. The trial court in *Alfa Laval* found that the Navy violated applicable procurement statutes and regulations by awarding a contract for centrifugal fuel oil purifiers to an offeror that submitted a non-compliant proposal.[262] The trial court nevertheless refused to grant the requested relief because it believed that the "colossal price difference" between the awardee's proposed price and the protester's proposed price precluded a finding of prejudice.[263] The CAFC disagreed and reversed.

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254. *Id.* at 3-4. The Army only asked "clarification" questions during the question and answer periods. *Id.*

255. *Id.* The RFP contemplated a two-step evaluation process. During the first step, the Army planned to evaluate the offerors' experience, past performance, price, and technical plan. During the second step, the Army planned to have the offerors included in the competitive range make oral presentations. The Army planned to score these oral presentations based on the following factors: (1) approach to liquidation, contaminated property, and quality assurance surveillance plan (45 points); (2) identification of hazardous substances and compliance with environmental regulations/maintenance of permits (40 points); and (3) physical inventory and property control system (25 points). *Id.*

256. *Id.* at 4. The new evaluation team gave RTF 54 points and Earth Tech 98 points. *Id.*

257. *Id*. at 4-10. First, the GAO concluded that the Army's decision to limit the scope of the reevaluation was reasonable since only part of the original evaluation was potentially flawed. *Id.* at 5-6. Second, the GAO concluded that RTF's allegation that the evaluators misunderstood its proposal constituted a "mere disagreement" with the agency's technical judgment–it did not make the Army's evaluation unreasonable. *Id.* at 7-8. Third, the GAO concluded that the new evaluators were "well qualified" to evaluate the offerors' proposals, even though they were not familiar with the LHAAP, and the RTF had failed to produce any credible evidence of bad faith or bias on their part. *Id.* at 8-9. Finally, the GAO concluded that Earth Tech's submission of a "below cost" proposal did not render the proposal non-compliant where Earth Tech did not object to or seek to avoid any of the RFP requirements. *Id.* at 9-10.

258. *Id*. at 11. *See* 10 U.S.C.A. § 2305(a)(3)(A) (West 1999); 41 U.S.C.A. § 253a(c)(1)(B) (West 1999); *see also* FAR, *supra* note 17, at 15.304(c)(1).

259. *RTF/TCI/EAI Joint Venture*, 98-2 CPD ¶ 162 at 11. The GAO indicated that the only thing saving the Army's evaluation scheme was the Army's stated intent to award the contract to the offeror whose proposal represented the "best value" based on an integrated assessment of the evaluation factors. *Id*.

260. *Id. Cf.* Int'l Investigative Serv. v. United States, 42 Fed. Cl. 73 (1998); Electronic Design, Inc., B-279662.2, B-279662.3, B-279662.4, Aug. 31, 1998, 98-2 CPD 68.

261. 175 F.3d 1367. To prevail in a bid protest, the protester must show that there was: (1) "a significant, prejudicial error in the procurement process," and (2) "a substantial chance it would have received the contract award but for that error." *Id*. (quoting Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581-82 (Fed. Cir. 1996)).

262. *Id*. The awardee's proposal did not meet one of the testing requirements specified in the RFP. *Id.*

The CAFC stated that it would "consider all the surrounding circumstances in determining whether there was a substantial chance that a protester would have received an award but for a significant error in the procurement process."[264] The CAFC then considered three facts. First, Alfa Laval was a competent supplier. Second, Alfa Laval submitted the only compliant proposal. Third, Alfa Laval proposed a per-unit price that was less than its previous price for the same purifiers. As a result, the CAFC concluded that Alfa Laval must have had a substantial chance of receiving the contract award.[265]

Past Performance

Past Performance Guide Issued

Past performance continued to play a prominent role in the source selection process this year. In May 1999, the DOD Past Performance Integrated Product Team (IPT) published "A Guide to Collection and Use of Past Performance Information."[266] This publication offers easy to follow guidance regarding how to obtain and use past performance information.

Class Deviation Extended

On 29 January 1999, the Director of Defense Procurement extended indefinitely the DOD's class deviation from FAR requirements regarding the collection and use of past performance information.[267] Under the deviation, DOD contracting activities must evaluate past performance in all source selections for negotiated acquisitions of: (1) systems and operations support expected to exceed $5 million; (2) services, information technology, or science and technology expected to exceed $1 million; and (3) fuels or health care expected to exceed $100,000.[268] In addition, DOD contracting activities must prepare contractor performance evaluations for contracts that fall within the same thresholds.[269]

Cases

Past performance continued to generate a significant number of protests before the GAO[270] and the COFC[271] this year.

Agencies Prohibited from Lowering Past Performance Rating Based on History of Filing Claims

Contracting officers and government attorneys handle a plethora of claims in their careers. A single contract often generates enough claims to keep legions of contracts professionals and their counsel fully employed. The question is: may an agency use a contractor's history of filing claims to lower the contractor's past performance evaluation? The GAO addressed this question in *AmClyde Engineered Products Co., Inc.*[272]

The Navy in *AmClyde* issued a RFP to manufacture shipyard cranes. The RFP indicated that the Navy would award the contract on a best value basis. Past performance was one of three technical subfactors. The RFP asked offerors to submit at least three references for similar projects. The Navy intended to use these references to assess each offeror's capabilities, workmanship standards, adherence to contract schedules, ability to take necessary corrective action, and reasonableness with respect to change order pricing.[273]

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263. *Id.* at 1367-68. *See* Alfa Laval Separation, Inc. v. United States, 40 Fed. Cl. 215 (1998).

264. *Alfa Laval*, 175 F.3d at 1368.

265. *Id.*

266. U.S. Dep't of Defense, A Guide to Collection and Use of Past Performance Information (May 1999), *available at* DOD Acquisition Reform Homepage (visited Nov. 9, 1999) <http://www.acq.osd.mil>.

267. Memorandum from Director, Defense Procurement, to Directors of Defense Agencies et. al., subject: Class Deviation–Past Performance (29 Jan. 99) [hereinafter Past Performance Memo]. This memorandum superseded the class deviation issued on 18 December 1997 and applies "until further notice." *Id.*

268. *Id*. *Cf.* FAR, *supra* note 17, at 15.304(c)(3) (generally requiring agencies to evaluate past performance in all source selections for negotiated acquisitions expected to exceed $100,000).

269. Past Performance Memo, *supra* note 267. *Cf.* FAR, *supra* note 17, at 42.1502 (a) (generally requiring agencies to prepare contractor performance evaluations on all contracts in excess of $100,000).

270. *See, e.g.*, Universal Bldg. Maintenance, Inc., B-282456, 1999 U.S. Comp. Gen. LEXIS 132 (July 15, 1999); Inland Serv. Corp., B-282272, 1999 Comp. Gen. LEXIS 101 (June 21, 1999); ACS Gov't Solutions Group., Inc., B-282098, B-282098.2, B-282098.3, June 2, 1999, 99-1 CPD ¶ 106; NAPA Supply of Grand Forks, Inc., B-280996.2, May 13, 1999, 99-1 CPD ¶ 94; National Aerospace Group, Inc., B-281958, B-281959, May 10, 1999, 99-1 CPD ¶ 82; Marathon Watch Co. Ltd., B-281876, B-281876.2, Apr. 22, 1999, 99-1 CPD ¶ 89; Oahu Tree Experts, B-282247, Mar. 31, 1999, 99-1 CPD ¶ 69.

271. *See, e.g.*, Forestry Survey & Data v. United States, 44 Fed. Cl. 493 (1999); Marine Hydraulics Int'l, Inc. v. United States, 43 Fed. Cl. 664 (1999).

272. B-282271, June 21, 1999, 99-2 CPD ¶ 5.

273. *Id.* at 3.

Three offers, including AmClyde's, made the competitive range. The Navy gave AmClyde a lower past performance score because AmClyde's past performance history showed poor customer satisfaction, an inability to meet milestone schedules, reliability problems, documentation inaccuracies, and a history of filing claims.[274] The Navy awarded the contract to Samsung, which submitted the lowest-priced, lowest technically rated offer, because the technical advantage of the higher-priced, higher technically rated offers did not offset Samsung's significant price advantage.

AmClyde protested several aspects of the procurement, including its past performance evaluation. The record showed that AmClyde had extensive, relevant experience manufacturing cranes for the Navy. AmClyde's references, however, provided a number of negative comments and noted that AmClyde often got "entangled" in legal battles.[275] Although AmClyde disagreed with most of the Navy's evaluation, it could not provide any contrary evidence. AmClyde complained that "the Navy should not have downgraded its proposal for making claims, since this is a mechanism that a contractor is entitled to pursue whenever there is a dispute on a contract and many of AmClyde's claims were meritorious."[276] AmClyde also alleged that the Navy used its claims history information improperly to lower its past performance score without giving it the opportunity to address the Navy's concerns during the discussions.

The GAO found that AmClyde could not prove that it would have received a materially better past performance rating if the Navy had addressed these issues during the discussions because the Navy had other past performance concerns that AmClyde could not refute.[277]

Use of Automated Best Value Model to Assess Delivery Performance Permitted Despite Systemic Deficiencies

As automated evaluation systems and models become a more common part of the proposal evaluation process, agencies must ensure that their systems and models provide fair and reasonable results. In *Island Components Group, Inc.*,[278] the Defense Supply Center in Richmond, Virginia (DSCR) issued a RFQ for an electrical component. The RFQ indicated that the DSCR would evaluate a vendor's past performance based on scores computed using the Automated Best Value Model (ABVM).[279]

Island Components Group, Inc. protested the DSCR decision to use the ABVM system because it could not distinguish between vendors who complied with their original delivery date and vendors whose delivery dates were extended by contract modification.[280] Island alleged that vendors with "deep pockets" could purchase favorable ABVM scores by agreeing to pay the DSCR for extended delivery dates.[281]

The DCSR proffered four arguments in response to Island's protest. First, the DCSR claimed that the ABVM data gave it a reasonable basis for assessing a vendor's past performance, even though the system did not give it a detailed picture regarding delivery performance. Second, the DSCR showed that it modified the delivery date only on two percent of all contract

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274. *Id.* at 4.

275. *Id.* at 5.

276. *Id.* at 6.

277. *Id.* The GAO noted, however:

> While the claims apparently had no impact here, we agree with the protester that, absent some evidence of abuse of process, agencies should not lower a firm's past performance evaluation based solely on its having filed claims. Contract claims, like bid protests, constitute remedies established by statute and regulation, and firms should not be prejudiced in competing for contracts because of their reasonable pursuit of such remedies in the past.

Id. at 6 n.5. *See* Nova Group, Inc., B-282947, 1999 U.S. Comp. Gen. LEXIS 164 (Sept. 15, 1999) (sustaining a protest where the Navy downgraded the protester's proposal based solely on its history of filing contract claims); *see also* Buckeye Park Servs., Inc., B-282082, 1999 Comp. Gen. LEXIS 87 (June 1, 1999) (stating that an agency may base its evaluation of past performance on its own perceptions of inadequate performance, notwithstanding the protester's pending CDA appeal).

278. B-281517, Feb. 19, 1999, 99-1 CPD ¶ 43.

279. *Id.* at 1. The DCSR calculated the ABVM score by combining the delivery and quality scores for each Federal Supply System item a vendor provided. The DCSR based the delivery score on a formula that considered both the percentage of items tendered on or before the contract delivery date, and the number of days other items were past due. The DCSR based the quality score on reported product and packaging deficiencies. *Id*.

280. *Id*. at 2. The DCSR recalculated the delivery and quality scores each month as new performance data became available; however, the computer system the DCSR used to maintain the ABVM data had only one data field available for delivery data. As a result, the system could not distinguish between a contractor who met an original delivery date and a contractor who met an extended delivery date. If the DCSR modified a contract to change the delivery date, the new date appeared in the delivery data field and the system measured the vendor's performance from the new date. The system did not indicate that the new date was a revised date or the reason for the revision. *Id.*

281. *Id.*

line items in 1997 and one percent of all contract line items in 1998.[282] Third, the DSCR argued that the ABVM system allowed it to distinguish between contractors who were willing to give consideration for late delivery and those who were not, a factor that the DSCR contended was a valid basis for choosing a vendor. Finally, DCSR claimed that it had to use the existing data to compute the ABVM scores until it could compile new data to distinguish between original and revised delivery dates. The DSCR reasoned that it would not be able to compute ABVM scores without this data. Therefore, its contracting officers would not be able to evaluate an offeror's delivery performance unless they examined the offeror's individual contracts, which would be a "burdensome and labor intensive procedure that is simply not cost effective for most DSCR procurements, given their small dollar value."[283]

The GAO agreed with DSCR. For the majority of the DSCR's contract line items, the GAO found that the inability to distinguish between original and extended delivery dates did not matter because the DSCR did not extend the delivery date.[284] The GAO then observed that agencies legitimately may distinguish between contractors who are willing to give consideration for late delivery and those who are not. The GAO held that the value of the ABVM system to the DSCR outweighed any hypothetical unfairness to companies who were unwilling to offer consideration for late delivery.[285] In addition, the GAO agreed that the DSCR would be "unable to generate past performance scores on an automated basis" without the ABVM system. Therefore, the DCSR lacked any other cost-effective means of evaluating past performance.[286]

Documenting the Award Decision

Two recent cases demonstrated the danger of an agency's failure to provide proper award documentation. In *Biospherics, Inc.*,[287] the GAO sustained a protest based on the agency's failure to document its evaluation of the offerors' revised proposals; and, in *Opti-Lite Optical*,[288] the GAO sustained a protest based on the agency's failure to document its cost-technical trade-off.

Agency's Failure to Document Evaluation of Final Revised Proposals Improper

In *Biospherics, Inc.*, three offerors submitted timely proposals in response to a RFP for the operation of a publications clearinghouse for the Department of Health and Human Services Agency for Health Care Policy and Research (AHCPR). A peer review panel evaluated the offerors' proposals and concluded that the proposal submitted by Logistics Applications, Inc. (LAI) was technically unacceptable. In response, LAI protested to the GAO.

Before the GAO could decide LAI's protest, the AHCPR took corrective action. The AHCPR convened a new peer review panel, which concluded that all three proposals were technically acceptable.[289] The AHCPR then held discussions with all three offerors and accepted final revised proposals from each. Unfortunately, the AHCPR produced no documentation to show how it evaluated these proposals.[290] As a result, Biospherics, Inc. (Biospherics) protested when the AHCPR decided to award the contract to LAI.

On review, the GAO stated that agencies must document their adjectival ratings and point scores to show the relative strengths and weaknesses of the offerors' proposals. Agencies also must document the basis and reasons for their source selection decisions. Conclusory statements are insufficient. Therefore, the GAO could not conclude that the AHCPR's award decision was reasonable absent any post-discussion narratives explaining its rationale.[291]

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282. *Id.* at 3. DSCR's data also demonstrated that very few of the modifications involved delivery date extensions. *Id*.

283. *Id.* at 4. The GAO noted that 88% of DSCR's purchases were less than $25,000.

284. *Id.*

285. *Id.* The GAO said the potential inequity of companies with "deep pockets" obtaining a competitive advantage was not a widespread concern.

286. *Id.*

287. B-278508.4, B-278508.5, B-278508.6, Oct. 6, 1998, 98-2 CPD ¶ 96.

288. B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61.

289. *Biospherics, Inc.*, 98-2 CPD ¶ 96 at 2-3. The peer review panel supported its initial technical scores with narratives detailing the strengths and weaknesses of each proposal. *Id.*

290. *Id.* at 3. The GAO noted that the agency's source selection memorandum contained the following information: (1) a chronology of the procurement; (2) a listing of the technical evaluation factors; (3) each offeror's technical, past performance, and total scores; (4) each offeror's proposed costs; (5) a statement regarding why the AHCPR included all three proposals in the competitive range; (6) a statement reiterating the AHCPR's intent to give paramount consideration to the offerors' technical proposals unless the AHCPR considered two or more proposals technically equal; and (7) a statement that LAI's higher scored technical proposal represented the best value. *Id*. at 5.

Agency's Failure to Document Cost-Technical Trade-off Improper

In *Opti-Lite Optical*, six offerors submitted timely proposals in response to a RFQ for prescription eyeglasses for the VA.[292] Opti-Lite Optical submitted the lowest-priced proposal; however, its pricing scheme concerned the contracting officer. The contracting officer believed that Opti-Lite's pricing scheme was "unrealistic" and increased Opti-Lite's performance risk.[293] Therefore, the contracting officer awarded the contract to Classic Optical Laboratories, Inc., the offeror that submitted the proposal with the highest point score.[294]

In sustaining Opti-Lite's protest, the GAO indicated that the propriety of a cost-technical trade-off decision does not turn on bare differences in technical scores or ratings. Instead, the propriety of a cost-technical trade-off decision turns on whether the selection official made a reasonable decision that he could justify adequately based on the stated evaluation criteria. Unfortunately, the contracting officer made three mistakes. First, the contracting officer applied the numerical scores mechanically. Second, the contracting officer failed to document why Classic's technical superiority was worth its twelve percent cost premium.[295] Finally, the contracting officer found Opti-Lite nonresponsible without referring the matter to the SBA under its certificate of competency procedures, even though Opti-Lite was a small business.[296] As a result, the GAO recommended that the VA: (1) perform and document a proper cost-technical trade-off, and (2) refer the matter to the SBA if it concludes that Opti-Lite is nonresponsible.[297]

Two Strikes and You're Out? GAO Recommends Replacing Source Selection Official After Sustaining Two Protests

In *Intellectual Properties, Inc.*,[298] the GAO took an unusual step. After sustaining two protests, the GAO recommended that the Ballistic Missile Defense Organization (BMDO) appoint a new source selection official.

In its first protest, Intellectual Properties, Inc., (IPI) challenged the BMDO's refusal to fund its proposal to perform phase II research under DOD's Small Business Innovation Research (SBIR) program.[299] IPI alleged that the BMDO's reliance on its lack of private sector funding was inconsistent with the evaluation criteria set forth in the solicitation,[300] and the GAO agreed.[301] The GAO held that the BMDO's failure to consider whether IPI's phase II proposal contained other indicators of commercial potential was inconsistent with the terms of the solicitation.

In its second protest, IPI alleged that the BMDO's reevaluation of its proposal was unreasonable,[302] and the GAO again agreed. The GAO concluded that the evaluation record failed

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291. *Id.* at 5. The GAO stated:

> In sum, the evaluation and source selection record furnished to our Office–numerical scores and a blanket determination of acceptability, no post-discussion narratives, and the source selection memorandum which contains no explanation of how the revised proposals affected the initial evaluation–is insufficient for our Office to determine the reasonableness of the agency's evaluation of proposals and the reasonableness of the agency's selection decision.

Id. at 5-6.

292. *Opti-Lite Optical*, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 at 2. The RFQ contemplated to the offeror who submitted the most advantageous proposal based on the following three technical evaluation factors: (1) methodology of approach, (2) personnel qualifications, and (3) past performance. *Id*. at 1-2.

293. *Id.* at 2. Opti-Lite entered a proposed price of "0" for 71 of the 85 line items in the RFP. *Id*.

294. *Id.* Classic submitted the best technical proposal at the second best price. In contrast, Opti-Lite submitted the third best technical proposal at the best price. As a result, the evaluators awarded Classic and Opti-Lite the following point scores: Classic had a technical merit score of 92 and a price score of 88 for a total of 180. Opti-Lite had a technical merit score of 70 and a price score of 100 for a total of 170. *Id*.

295. *Id*. at 5. The GAO noted specifically that "[w]here a price/technical tradeoff is made, the source selection decision must be documented, and the documentation must include the rationale for any tradeoffs made, including the benefits associated with additional costs." *Id*.

296. *Id.* at 6. *See* FAR, *supra* note 17, subpt. 19.6.

297. *Opti-Lite Optical*, 99-1 CPD ¶ 61 at 6. Opti-Lite later filed a second protest in response to the VA's corrective action. Opti-Lite Optical, B-281693.2, 1999 U.S. Comp. Gen. LEXIS 122 (July 15, 1999). Opti-Lite challenged the VA's use of the original evaluation panel to reevaluate the technical proposals; however, the GAO upheld the VA's reevaluation, stating that "where an agency's corrective action involves reevaluating proposals, there is no requirement that the reviewing personnel be replaced." *Id*.

298. B-280803.2, May 10, 1999, 99-1 CPD ¶ 83.

299. *Id.* at 3 (citing Intellectual Properties, Inc., B-280803, Nov. 19, 1998, 98-2 CPD ¶ 115). The SBIR is a three-phase program conducted pursuant to the Small Business Innovation Development Act. *Id*. In phase I, small businesses "concentrate on that research or research and development which will significantly contribute to proving the scientific, technical, and commercial feasibility of the proposed effort." *Id*. at 2. In phase II, small businesses continue their research and development efforts. *Id.* Finally, in phase III, small businesses "use non-federal capital to pursue private sector applications of the research or development." *Id*. at 2.

to support the BMDO's decision not to fund IPI's phase II proposal.[303] For example, the GAO noted that some of the evaluators thought that IPI's proposal was innovative and had technical merit. Yet, the BMDO failed to explain why the positive evaluations were wrong.[304] As a result, the GAO sustained the protest and made the following recommendation: "We recommend that, since we have twice sustained IPI's protests, the agency appoint a new source selection official to reconsider and document its determination as to whether IPI's phase II proposal should be funded."[305]

Simplified Acquisitions

Offer Lapses When Contractor Fails to Timely Deliver Under Unilateral Purchase Order

Contracting officers may read the simplified acquisition procedures in FAR Part 13 for guidance concerning both the legal effect of a quotation, and the process for terminating or canceling a purchase order.[306] Unsurprisingly, the regulation does not address every conceivable issue. The ASBCA's decision in *Alsace Industrial, Inc.*,[307] helps clarify the rights and obligations of the parties when the contractor fails to timely deliver under a purchase order.

The contracting officer in *Alsace* issued a purchase order for 184 output coupling retainers, with a delivery date of 2 November. The contracting officer did not request written acceptance of the purchase order. Acceptance, rather, would result from Alsace's delivery of the supplies. After Alsace requested an extension due to a delay caused by its casting company, the contracting officer extended the delivery date to 16 December. Before 9 December, the government requested a no-cost cancellation of the purchase order, but Alsace stated it had completed the parts and would ship them by 16 December. On 9 December, Alsace advised the government that the output coupling purchase order and one other purchase order could be canceled for a "small cancellation fee."[308] In the alternative, Alsace would make late delivery.

On 18 December, Alsace advised the government that the new delivery date would be 26 January, to which the government agreed. When Alsace failed to deliver on that date, the contracting officer issued a modification stating that the offer had lapsed and the government would not accept delivery. Alsace then filed a claim seeking damages or permission to deliver the ordered parts.[309] The contracting officer denied the claim, and Alsace filed an appeal under the ASBCA's Accelerated Procedure.[310]

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300. *Id.* at 2. The solicitation indicated that the BMDO would evaluate phase II proposals based on the following factors:

> a. The soundness and technical merit of the proposed approach and its incremental progress toward topic or subtopic solution.
> b. The potential for commercial (government or private sector) application and the benefits expected to accrue from this commercialization.
> c. The adequacy of the proposed effort for the fulfillment of requirements of the research topic.
> d. The qualifications of the proposed principal/key investigators supporting staff and consultants.

Id.

301. Intellectual Properties, Inc., B-280803, Nov. 19, 1998, 98-2 CPD ¶ 115.

302. *Intellectual Properties*, 99-1 CPD ¶ 83 at 5. In response to the GAO's recommendation that the BMDO reevaluate IPI's phase II proposal, the BMDO sent the proposal to 22 individuals with radar expertise. Five individuals responded, four of whom recommended the conditional acceptance of IPI's phase II proposal. *Id*. at 3-4.

303. *Id*. at 7. Despite the favorable recommendations the BMDO Program Manager received from some of the evaluators, he alleged that IPI's proposal duplicated previous research efforts and lacked innovation. In addition, the BMDO Program Manager alleged that IPI's proposal lacked technical merit. *Id*. at 4.

304. *Id.* at 7-8. The BMDO Program Manager alleged for the first time at the hearing that he rejected IPI's proposal because BMDO was pursuing other technologically similar programs that were further along in the development process. This argument, however, did not persuade the GAO, which stated that "we accord lesser weight to post-protest judgments such as the Program Manager's conclusion that the protester's proposal was duplicative of other BMDO programs." *Id*. at 10.

305. *Id.* at 11.

306. The FAR states that a quotation is not an offer and, consequently, cannot be accepted by the government to form a binding contract. A purchase order is an offer by the government which can be accepted by the contractor, either in writing or by delivery of the requested supplies or services. FAR, *supra* note 17, at 13.004(a), (b). The FAR also lists procedures for terminating a purchase order that has been accepted in writing, and cancellation of a purchase order that has not been accepted in writing. FAR, *supra* note 17, at 13.302-4.

307. ASBCA No. 51708, 99-1 BCA ¶ 30,220.

308. Alsace thereafter calculated the "small fee" to be $4189.08. *Id.* at 149,508.

309. Alsace also requested award of the order for parts under the government's new solicitation. *Id.*

310. ASBCA Rule 12.3 provides for board decision within 180 days of receipt of an appellant's notice of election of the Accelerated Procedure.

The board also denied the claim, holding that the government's offer under the unilateral purchase order lapsed by its own terms when Alsace failed to deliver on time. As a result, the board held that Alsace bore the costs of nonperformance. Once the order lapsed, the contracting officer had the discretion to reinstate the purchase order with a different delivery date. Alsace could not compel the contracting officer to grant a delivery date extension.

Not satisfied, Alsace filed a Motion for Reconsideration.[311] The ASBCA stated that Alsace's partial performance bound the government to keep its offer open until the time stated in the offer.[312] The board then reiterated that Alsace's untimely delivery resulted in the lapse of the government's offer, after which Alsace lost its ability to bind the government.

Take Note: Document That Source Selection Decision

In a protest, the GAO determines whether the contracting officer conducted the procurement consistent with a concern for fair and equitable competition and evaluated proposals or quotes consistent with the solicitation terms. A contracting officer's source selection decision is one of the key documents the GAO will consider when deciding a protest. The GAO has issued two decisions that emphasize the importance of the source selection decision to a simplified acquisition, notwithstanding the ease with which a simplified acquisition can be conducted compared to a negotiated procurement.

In *Universal Building Maintenance, Inc*.,[313] the GSA issued a RFP for custodial services. The GSA used commercial item and simplified acquisition procedures. The RFP called for technical proposals that addressed past performance, equipment, and organizational structure. Offerors also made oral presentations to address quality control and plan of operation, and submitted price proposals. The government considered technical factors and price to be equal in weight, with award going to the most advantageous proposal.

After evaluation of proposals, development of a competitive range, and submissions of best and final offers, an evaluation board prepared a document called "Recommendation of Awardee." The document ranked the technical proposals and oral presentations of the nine offerors in the competitive range. The board also prepared separate price charts summarizing the price proposals. The awardee had a technical score of nineteen, while the protester had a score of fourteen. Five other offerors had technical scores higher than the protester. The protester had the lowest price among the competitive range offerors, and it was twenty-two percent lower than the awardee's price. The evaluation board opined that the awardee offered the "best value" and recommended that it receive the award. The contracting officer signed the document approving the board's recommendation. No other document was prepared by the agency that justified the award decision.

In the ensuing protest, the GAO concluded that the award decision was not supported and documented adequately. It pointed to provisions in FAR Parts 12 and 13 that required some explanation of the award decision.[314] In addition, the GAO found that the selection decision was flawed because the contracting officer made no qualitative comparison of the technical proposals to determine whether payment of a price premium was warranted.[315]

The GAO in *Environmental Tectonics Corp*. (ETC) reached a different result.[316] The Navy's RFQ stated that a purchase order would be issued to the vendor whose quotation was most advantageous to the government, price and other factors considered. In descending order of importance, the best value award factors were price, delivery schedule, risk, and past performance. The only differences between ETC and the awardee were in the past performance and price factors: ETC had a high risk in past performance (awardee had low risk), but was priced forty-six percent lower than the awardee. The contracting officer determined that ETC's low price did not offset its high-risk past performance rating, and documented this finding in a

311. 99-1 BCA ¶ 30,343.

312. The decision indicates that partial performance obligates the government only to keep the offer open until the time stated in the offer. The decision did not address the applicability of FAR 13.004(b), which provides that a "supplier may indicate acceptance by furnishing the supplies or services ordered *or by proceeding with the work to the point where substantial performance has occurred*." FAR, *supra* note 17, at 13.004(b) (emphasis added).

313. B-282456, 1999 U.S. Comp. Gen. LEXIS 132 (July 15, 1999).

314. *See* FAR, *supra* note 17, at 13.106-3(b)(3)(ii) ("[T]he contracting officer should] [i]nclude additional statements [s]upporting the award decision if other than price-related factors were considered in selecting the supplier"); *id.* at 12.602(c) ("Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered"); *id.* at 13.501(b)(3) ("The contract file shall include [a]n explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision").

315. This case also sheds light on the when a contracting officer has made a responsibility determination that must be passed along to the SBA. The contracting officer, presumably during the litigation of the protest, suggested that the protester's price was so low as to endanger performance. The GAO concluded that the contracting officer should have referred this finding of nonresponsibility to the SBA. *See Universal Building*, 1999 U.S. Comp. Gen. LEXIS 132 at *10. Contrast this with *Environmental Tectonics Corp.*, B-280573.2, Dec. 1, 1998, 98-2 CPD ¶ 140, in which the Navy did not find the protester to be nonresponsible. Rather, the Navy found the protester's high risk rating for past performance outweighed its low price.

316. B-280573.2, Dec. 1, 1998, 98-2 CPD ¶ 140.

source selection decision. The GAO upheld the selection decision as reasonable.

Commercial Items

When Is an Item a "Commercial Item"?

The various terms associated with commercial item procurements, such as commercial-off-the-shelf (COTS) and nondevelopmental item (NDI), serve as fodder for protest actions.[317] Designating an acquisition as one for commercial items inures to the benefit of both the government and contractors;[318] thus, contracting officers must understand and defend their rationale for classifying an item as either commercial or noncommercial.

Commercial Item Modifications Upheld

The FAR permits modifications to commercial items.[319] The GAO addressed this issue in *Premiere Engineering and Manufacturing, Inc*.[320] In *Premiere*, the Air Force incorporated the FAR clause into a solicitation for commercial truck-mounted deicers, in which the Air Force sought a two-engine design. The awardee offered to modify its commercial single-engine deicer by adding an auxiliary engine and informed the Air Force that it had offered the same modification to a previous commercial customer. The Air Force also went to the awardee's plant and found that its single-engine and two-engine deicers were "90% similar."[321]

Based on these facts, the GAO found that the addition of an auxiliary engine was a modification of a type customarily available in the commercial market. The GAO concluded that the ninety percent similarity between the single-engine and two-engine deicers indicated that the essential physical characteristics of the commercial deicer had not been altered significantly. Finally, as the purpose of the commercial model and the modified model remained to deice aircraft, the addition of the auxiliary engine did not change the purpose of the offered item. Accordingly, the GAO denied the protest.[322]

Guess What! Radioactive Waste is not a Commercial Item!

In *Envirocare of Utah, Inc. v. United States*,[323] the protester argued that the USACE's solicitation for radioactive waste disposal services should have triggered the agency's use of FAR Part 12 commercial item requirements. The COFC analyzed the FAR definition for commercial item services[324] and concluded that the procurement did not trigger Part 12 requirements. Specifically, the court concluded there was no market price for radioactive waste disposal services,[325] nor was there a competitive market.[326] The court noted that Envirocare may

317. The definition also may inhibit agencies from using FAR Part 12 to the extent intended by Congress. Messrs. Nash & Cibinic "believe much of the hesitancy to use Part 12 of the FAR is caused by the hard-to-understand definition of 'commercial item.'" Ralph C. Nash & John Cibinic, *BUYING COMMERCIAL ITEMS: Signs Of Progress*, 13 THE NASH & CIBINIC REP. NO. 5, 75 (May 1999).

318. When an item is classified as a commercial item, contracting officers may use the streamlined solicitation and evaluation procedures outlined at FAR Subpart 12.6. In addition, FAR Subpart 12.5 provides that certain laws, such as the Truth in Negotiations Act, do not apply to commercial item buys. FAR, *supra* note 17, subpt. 12.5, 12.6.

319. *See* FAR, *supra* note 17, at 52.202-1(c)(3)(i), (ii) (providing that modifications to a commercial item can be made if the modifications are "of a type customarily available in the commercial marketplace; or [are] [m]inor modifications of a type not customarily available in the commercial marketplace to meet Federal Government requirements. 'Minor' modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process.").

320. B-283028, B-283028.2, 1999 U.S. Comp. Gen. LEXIS 174 (Sept. 27, 1999).

321. *Id.* at *7.

322. *Id.* at *16.

323. No. 99-76C, 1999 U.S. Claims LEXIS 128 (Fed. Cl. June 11, 1999).

324. FAR, *supra* note 17, at 2.101(f), provides that one definition of a commercial item is "[s]ervices of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions." One commentator noted that the *Envirocare* court failed to focus on the "of a type" portion of the definition, which purportedly broadens its coverage. Ralph C. Nash, *POSTSCRIPT III: Defining Commercial Services*, 13 THE NASH & CIBINIC REP. NO. 8, 118 (Aug. 1999).

325. *Envirocare*, 1999 Comp. Gen. LEXIS 174, at *30. The court, noting that the FAR did not define "market price," looked to the legislative history of the National Defense Authorization Act for 1996 and determined that "market prices are current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated from sources independent of the offeror." Based on trial testimony, the court concluded there was no market pricing for disposal services. Envirocare's senior vice president for business development admitted at trial that the only reliable way to obtain a price for radioactive waste disposal services was to ask the offeror. The agency's witness testified that standard disposal rates do not exist; rather, unit disposal rates are determined on a case-by-case basis, depending on a variety of factors such as volume, shipment configuration, and amount of debris. *Id.* at *31-*34.

326. *Id.* The COFC also noted that the FAR did not explain when a market could be considered "competitive." Despite this lack of guidance, based on the administrative record and trial testimony, the court concluded that Envirocare failed to prove that a competitive market existed for radioactive waste disposal services. *Id*.

have been the only contractor able to dispose of the wastes mentioned in the solicitation.

Commercial Items: Know the Language!

The GAO decisions in *Avtron Manufacturing, Inc.*,[327] *Chant Engineering Co., Inc.*,[328] and *Omega World Travel, Inc.*[329] show the importance of understanding commercial item terminology when drafting solicitations and evaluating offers. Avtron contended that the awardee failed to offer a NDI test stand, as required under the solicitation. The Air Force's solicitation included a Performance Purchase Description (PPD). One provision in the PPD called for a test stand that was an "already developed, state-of-the-art, market proven, commercial test stand with a proven reliability track record. Minor modifications are allowed to the existing test stand . . . ."[330] Another provision in the PPD stated that the "proposed test stand shall be a commercial NDI test stand . . . ."[331]

The GAO interpreted the PPD provisions to allow for the offer of either a commercial item or a NDI.[332] In its proposal, the awardee offered an existing commercial test stand that was repackaged and updated with state-of-the-art components that needed only minor modifications to meet the solicitation requirements. Accordingly, the GAO denied Avtron's protest.

In *Chant*, the Navy sought proposals for a COTS, or existing, test station. The Navy eliminated Chant from the competitive range because it offered to fabricate, for the first time, a customized test station composed of some COTS components. The GAO denied the protest, stating that "[n]ew equipment like Chant's proposed test station, which may only become commercially available as a result of the instant procurement, clearly does not satisfy the RFP requirement for commercial-off-the-shelf (existing) equipment."[333]

In *Omega*, the GAO concluded an agency need not use a brand name description when soliciting COTS items.[334] The GAO stated that the FAR authorizes an agency to describe its commercial item needs in terms of function, performance, or physical characteristics. The agency had conducted market research and identified two commercial software brands that would satisfy its travel processing needs. Contrary to the protester's allegation that the agency should have described its needs by brand name, the GAO held that the agency properly described the functional requirements for the software it sought.

Market Research: There Is No Substitute

The FAR, in implementing the FASA's[335] preference for acquiring commercial items, limits contract terms and conditions to those required by law or consistent with customary practice.[336] Contracting officers may tailor commercial item clauses, either as a customary practice based on market research[337] or under a waiver describing the necessity of including a term or condition inconsistent with customary commercial practice.[338]

The GAO's decision in *Smelkinson Sysco Food Services*[339] drives home the need to conduct market research that consists of "a meaningful exchange of information between the agency and industry."[340] The solicitation required offerors to disclose to the government the profit and freight costs in excess of actual

327. B-280758, Nov. 16, 1998, 98-2 CPD ¶ 148.

328. B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45.

329. B-280456.2, Sept. 17, 1998, 98-2 CPD ¶ 73.

330. *Avtron*, 98-2 CPD ¶ 148 at 1-2.

331. *Id.* at 2.

332. *Id.* at 5. The GAO pointed out that the statutory definition of a NDI encompasses a commercial item. *Id.* at 5 n.5. The FAR lists three definitions of a NDI, the primary definition being "[a]ny previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement." FAR, *supra* note 17, at 2.101.

333. *Chant*, 99-1 CPD ¶ 45 at 4. As noted by the GAO, one of the purposes for a commercial item procurement is to avoid the risks associated with the design and engineering of a new item. *Id.*

334. 98-2 CPD ¶ 73 at 2.

335. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243.

336. FAR, *supra* note 17, at 12.301(a).

337. *Id.* at 12.302(a) (providing that tailoring of a clause is authorized after a contracting officer conducts "appropriate market research").

338. *Id*. at 12.302(c). The waiver must be approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice, and include a determination that use of the customary commercial practice is inconsistent with the needs of the government. *Id.*

costs related to interorganizational transfers among affiliates. Smelkinson protested the solicitation terms as contrary to customary practice in the food distribution industry. The government insisted that it did not need a waiver to include the "interorganizational transfers clause"[341] because the terms of the clause were consistent with customary commercial practice in the food distribution industry.

In sustaining the protest, the GAO found that the record did not show that the specific disclosure requirements of the "interorganizational transfers clause" had been researched, discussed with, or commented upon by industry representatives. The GAO stated that the techniques and factors mentioned in the FAR[342] reflect the purpose of market research as "generat[ing] a meaningful exchange of information between the agency and industry."[343] The government contended that it had discussed its "prime vendor program" at several conferences and had included the "interorganizational transfers clause" in several recent solicitations. Having received no protests, the government argued the terms were consistent with customary practice. The GAO held that "such silence alone is not an acceptable substitute" for the government's obligation to conduct market research.[344]

The GAO Says Fifteen-Day Response Period Adequate

The FAR allows contracting officers to establish a shorter response time for commercial item solicitations than that which is generally required.[345] The GAO upheld a response time of fifteen days in *American Artisan Productions, Inc.*,[346] in which the GSA requested proposals for the lease of an exhibit booth and related services for several large-scale exhibition projects.

The GAO found the fifteen-day period reasonable for several reasons. The GSA synopsized the requirement in the CBD twenty-seven days before issuing the solicitation.[347] The contracting officer viewed a fifteen day response time as reasonable because she had allowed a twenty-two-day response period in the previous year's more complex procurement. Finally, the GSA received offers from five contractors.

The GAO Identifies Weaknesses in Sole-Source Price Analysis[348]

This past year, the GAO issued a report reviewing how the DOD prices commercial items. In an evaluation of sixty-five sole-source commercial item purchases, the GAO identified problems with the government's price analysis. In more than half of the purchases, the contracting officer compared the offered price with the offeror's catalog price, or with the price paid in previous procurements. The government negotiated lower prices in only three of the thirty-three cases.

The GAO criticized the government's failure to ensure the prices paid were fair and reasonable. First, the government did not use FAR clause 52.215-20, which would require contractors to provide an explanation for the offered price, its relationship to the catalog price, and its relationship to the price in recent sales involving similar quantities. Moreover, contracting officers failed to compare "apples to apples." For example, on two occasions the government made nonurgent purchases for stock replenishment. In one case, the government paid a price based on a ten-day delivery, when delivery was not required for nineteen months. In a second case, the government paid for ten-day delivery even though the contractor would not complete delivery until one year after placement of the order.

339. B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57.

340. *Id.* at 5.

341. *Id*. at 2. The clause stated that the contractor must disclose to the government any profit a transferring organization made for materials, supplies, and services transferred to the contractor's affiliates or divisions. If the contractor failed to disclose such profit, then no profit could be included in the price charged to the government. *Id.*

342. FAR Part 10 addresses market research. *See* FAR, *supra* note 17, at 10.002(b)(2) (listing possible techniques for conducting market research).

343. *Smelkinson*, 99-1 CPD ¶ 57 at 4.

344. *Id.* at 6.

345. The FAR generally requires the government to allow for a response time of at least 30 days. In a commercial item procurement, a contracting officer may establish a shorter, reasonable response time commensurate with the acquisition's complexity, commerciality, availability, and urgency. *See* FAR, *supra* note 17, at 5.203(b), (c).

346. B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155.

347. The FAR requires agencies to wait at least 15 days from publication of the CBD notice before issuing a solicitation, except for commercial item acquisitions. The GSA could have issued the solicitation in less than 15 days. FAR, *supra* note 17, at 5.203(a)(1).

348. General Accounting Office, Contract Management: DOD Pricing of Commercial Items Needs Continued Emphasis, Rep. No. GAO/NSIAD-99-90 (June 24, 1999). The GAO looked at contracts concerning aircraft spare parts.

An antidote to the commercial-item pricing problems identified by the GAO may lie in an interim rule[349] amending the FAR to implement sections of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999.[350] The amendments advise contracting officers that existence of a price in a price list, catalog, or advertisement does not, in and of itself, establish a price to be fair and reasonable.[351] Unless there has been adequate price competition[352] or prices are set by law or regulation,[353] a contracting officer must require the offeror to provide information, other than cost or pricing data, that is adequate to establish a fair and reasonable price.[354] This must include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold.[355] Failure of the contractor to submit the requested information will make it ineligible for award unless the head of the contracting activity determines it in the government's interest to make award.[356]

Small Business

To Bundle or Not to Bundle

Contract "bundling"[357] has become a lighting rod for small businesses competing for government contracts.[358] This past year, agencies have struggled to define the parameters of bundling. Remember Goldilocks and the three bears? One might say that bundling, like porridge, may or may not always be "just right." Some examples illustrate this point.

This Solicitation Is Too Large!

On 25 October 1999, the SBA issued an interim rule addressing contract bundling.[359] The rule requires agencies to avoid unjustified and unnecessary bundling to the "maximum extent practicable."[360] In essence, the rule attempts to reign in bundled contracts that are too large and thus restrict competition for small businesses.

The SBA rule has several key parts. First, the rule reiterates various parts of the Small Business Authorization Act. For example, the rule defines bundling and describes when bundling is permissible.[361] The rule also allows for contract "teaming" among two or more small firms, who may then submit an offer on a bundled procurement as a single small business.[362] Second, the rule requires the procuring activity to submit to the SBA for review any statement of work containing bundled requirements.[363] When the SBA believes the bundled requirements are too large, it may appeal to the head of the contracting agency. Moreover, when the solicitation requirements are "substantial,"[364] the agency must show that the bundling is necessary and justified,[365] and that it will obtain "measurably substantial benefits."[366] This includes cost savings, timesaving,

349. 64 Fed. Reg. 51,835 (1999). *See* Federal Acquisition Circular (FAC) 97-14, FAR Case 98-300, Determination of Price Reasonableness and Commerciality *available at* <http://farsite.hill.af.mil>.

350. Pub. L. No. 105-261, §§ 803, 808, 112 Stat. 1920 (1998).

351. 64 Fed. Reg. at 51,836 (amending FAR 13.106-3(a)(2)(iii)).

352. FAR, *supra* note 17, at 15.403-1(b)(1).

353. *Id.* at 15.403-1(b)(2).

354. 64 Fed. Reg. at 51,836 (amending FAR 15.403-3(a)(1)).

355. *Id.* To help determine the type of information a contractor should provide, the interim rule directs contracting officers to consider the guidance in Section 3.3, Chapter 3, Volume I, of the Contract Pricing Reference Guide. *Id.* The guide is prepared jointly by the Air Force Institute of Technology and the Federal Acquisition Institute and is informational, not directive, in nature. Free copies of the five-volume set can be obtained online at <http://www.gsa.gov/fai>.

356. 64 Fed. Reg. at 51,836-37 (adding FAR 15.403-3 (a)(4)).

357. Contract bundling is the practice of combining two or more procurement requirements, provided for previously under separate contracts, into a solicitation for a single contract. 15 U.S.C.A. § 632(o)(2) (West 1999).

358. *See, e.g.*, General Accounting Office, Base Operations: DOD's Use of Single Contracts for Multiple Support Services, GAO/NSIAD-98-82 (Feb. 27, 1998) (addressing contract bundling and small business concerns in the context of cost studies under OMB Circular A-76).

359. 64 Fed. Reg. at 57,366. The interim rule is effective on 27 December 1999, and supplants the proposed rule issued on 13 January 1999. *See* 64 Fed. Reg. at 2153. The interim rule implements provisions of the Small Business Authorization Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592. In addition, the OFPP has issued proposed guidance to increase subcontracting opportunities for small businesses, small disadvantaged businesses (SDB), and women-owned small businesses to counter the trend toward bundling. *See* 64 Fed. Reg. at 64,001.

360. 64 Fed. Reg. at 57,366.

361. *Id.* at 57,371.

362. *Id.* at 57,370.

enhanced performance, and other quantifiable benefits. Lastly, the proposed rule permits the SBA to recommend alternative procurement methods for a proposed bundled contract. These remedies range from breaking the large procurement into smaller procurements, breaking out components of the large procurement for small business set asides, and reserving for small businesses one or more awards under a multiple award contract.[367]

This Solicitation Is Just Right!

In *The Urban Group, Inc*.,[368] the GAO upheld the decision of the HUD to bundle services, finding that HUD's technique achieved measurably substantial benefits.

Historically, the HUD had contracted for property management services for foreclosed properties, but performed marketing services in-house. Faced with burdensome contract administration, the HUD reengineered its approach. This approach contemplated issuing fewer contracts covering larger geographic areas, and merging the management and marketing requirements under a single contract.[369] In *Urban Group*, the HUD implemented this approach with sixteen contracts for management and marketing services in sixteen designated areas of the United States. The protestor challenged the bundling of five states into one area and then designating that area for unrestricted competition. It argued that breaking up the area would make the competition suitable for small business set-asides.[370]

In denying the protest, the GAO first looked to the Small Business Act, which cautions agencies to "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors."[371] The GAO also noted, however, that the statute permits bundling if justified by "measurably substantial benefits," such as cost savings, quality improvements, reduced acquisition times, and better terms and conditions.[372] The GAO then shifted its focus to determine if the HUD had achieved the measurably substantial benefits to justify the bundling.

The GAO concluded that the HUD's solicitation for the management and marketing services was "just right." First, the GAO pointed out that the HUD's approach reasonably could be expected to reduce contract oversight. The HUD consolidated into sixteen geographic areas contracts previously managed by its eighty-one field offices. Moreover, the GAO found that the HUD was faced with "converging problems" of being unable to administer the large number of contracts with a reduced staff. Thus, the HUD had to find a way to improve management and marketing efficiency and quality in the face of fewer resources to administer the program. The GAO concluded that the HUD had little choice but to reduce its contract administration burden by having fewer contracts with more requirements, and by offering the contractors incentives to more efficiently perform the work.[373] The GAO also observed that the SBA agreed with the HUD's restructuring approach. The GAO recognized that the SBA found the expected benefits in cost savings and quality

363. *Id.* The procuring activity must submit a copy of the proposed acquisition to the SBA Procurement Center Representative (PCR) at least 30 days before issuing the solicitation. Generally, the PCR reviews all acquisitions not set aside for small businesses to determine if a set-aside is appropriate. The procuring activity also must conduct market research to gauge whether bundling of the requirements is necessary or justified. When delving into market research, the activity "should" consult with the PCR. *Id.* at 57,371.

364. *Id*. In the proposed rule, the SBA solicited comments on how to define "substantial bundling," such as in terms of a threshold contract value, a threshold number of geographic locations, or by Standard Industrial Classification (SIC) codes. *Id*. at 2154. In the interim rule, the SBA defined "substantial bundling" as a contract consolidation resulting in an award with an annual average value of $10 million or more. *Id*. at 57,371.

365. *Id*. at 57,371. According to the rule, an agency may find a consolidated requirement "necessary and justified" if it will derive measurably substantial benefits as compared to the benefits it would garner if it had not bundled the requirements. In addition, the rule states that a consolidated requirement is "necessary and justified" when subject to the cost comparison procedures in OMB Cir. A-76. *Id*.

366. *Id.* at 57,372. In essence, the rule requires the agency to quantify the identified benefits and show how they are measurably substantial. The benefits may include cost savings, price reduction, quality improvements that will save time or enhance performance, and other benefits that individually, combined, or in the aggregate, would lead to: (1) benefits equivalent to 10% if the contract value (including options) is $75 million or less, or (2) benefits equivalent to 5% if the contract value (including options) is over $75 million. The rule further states that reducing only administrative or personnel costs does not justify bundling unless those costs are expected to be substantial in relation to the dollar value of the procurement. *Id.*

367. *Id.* at 57,371.

368. B-281352, Jan. 28, 1999, 99-1 CPD ¶ 25. In another decision, the GAO upheld a solicitation for bundled desktop computing requirements, finding that the agency achieved "measurably substantial benefits." S&K Electronics, B-282167, 1999 U.S. Comp. Gen. LEXIS 103 (June 10, 1999).

369. The HUD had tested this approach successfully in three pilot programs. In these programs, the HUD reimbursed the contractors for repairs to the properties, and received a percentage of the price at which it sold each property. According to HUD, the pilot programs met or exceeded its sales goals and reduced the amount of time it held a foreclosed property. *Id*. at 3.

370. *Id.* at 8. The five states were Alabama, Georgia, Mississippi, North Carolina, and South Carolina.

371. 15 U.S.C.A. § 631(j)(3) (West 1999).

372. *Id.* § 644(e)(2)(B).

improvements substantial to justify the bundling of requirements.[374]

In the end, the GAO upheld the HUD's contract scheme because it achieved substantial cost savings and quality improvements. The GAO also stated the protester failed to offer a reasonable alternative to the contract bundling that would provide similar benefits.[375]

Adarand: *The Saga Continues*

In an odd twist, the Tenth Circuit Court of Appeals in March threw out as moot the long-running reverse discrimination suit that caused state and federal agencies to retool affirmative action rules. In *Adarand Constructors, Inc. v. Slater*,[376] the Tenth Circuit found that the plaintiff, Adarand Constructors, had been certified as a Disadvantaged Business Enterprise (DBE) under a state affirmative action program. Using a standing analysis, the court ruled that Adarand, now entitled to the benefits it challenged, could no longer "assert a cognizable constitutional injury" and vacated the lower court's decision.[377]

To understand the irony of the Tenth Circuit's decision, one must review the tortuous history of the *Adarand* cases. In 1995, the U.S. Supreme Court issued its landmark opinion in *Adarand Constructors, Inc. v. Pena*.[378] In that case, Adarand, a white-owned construction contractor, challenged a Subcontracting Compensation Clause (SCC) program that rewarded prime contractors with incentive pay if they used socially and economically disadvantaged subcontractors.[379] The Court ruled that all race-based affirmative action programs must meet a strict scrutiny standard to meet constitutional muster.[380] The Court offered no judgment on whether the SCC program met the strict scrutiny test, but remanded the case to the District Court to make such a determination.

On remand, the U.S. District Court for the District of Colorado granted summary judgment in favor of Adarand. In a lengthy opinion, the court concluded that the SCC program did not survive strict scrutiny.[381] Specifically, the court found that the SCC program was not narrowly tailored to further the government's interest in eliminating discriminatory barriers. In response to this ruling, the state of Colorado changed its DBE regulations to remove the presumption of social and economic disadvantage for racial and ethnic minorities. Instead, the state of Colorado premised DBE status on the applicant's certification that he or she is socially disadvantaged. As a result, Adarand was certified as a DBE. As a non-minority, Adarand could gain DBE status because its exclusion from the SCC program caused it to be socially disadvantaged.[382]

Meanwhile, the government appealed the district court's decision favoring Adarand. Finding that Adarand benefited from the DBE status it once challenged, the Tenth Circuit vacated the lower court's decision and remanded it with directions to dismiss.[383] The question now becomes: what is the future of *Adarand* and its progeny? Commentators expressed

373. *Urban Group*, 99-1 CPD ¶ 25 at 10-11.

374. *Id.* at 11. The SBA had also worked with the HUD to ensure that the RFP provided opportunities to the maximum extent practicable for small business concerns, both as prime and subcontractors. Accordingly, the SBA urged the GAO not to disturb the structure of the RFP. *Id*.

375. *Id*. at 11-12. Consistent with 15 U.S.C. § 644(e)(2)(c), the GAO found that the expected benefits from the bundling went beyond reducing administrative and personnel costs, but also improved program efficiency and quality. *Urban Group*, 99-1 CPD ¶ 25 at 11.

376. 169 F.3d 1292 (10th Cir. 1999).

377. *Id.* at 1295.

378. 515 U.S. 200 (1995).

379. *Id.* The facts of *Adarand* are straightforward. In 1989, the Department of Transportation awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids for the guardrail portion of the project. A Colorado-based company, Adarand Constructors, Inc., submitted the low bid. Another company, Gonzales Construction Company, also submitted a bid for the project. The contract between Mountain Gravel and the Department of Transportation stipulated that Mountain Gravel would receive additional compensation (under the SCC program) if it retained contractors who were small businesses controlled by "socially and economically disadvantaged" persons. Gonzales was certified as such a company. Adarand, however, was not so certified. Thus, Mountain Gravel awarded the guardrail subcontract to Gonzales. *See 1997 Year in Review*, *supra* note 3, at 41 (discussing the Supreme Court's decision in *Adarand*).

380. *Id*. at 228. To survive strict scrutiny, the classification must satisfy a two-prong test. First, the classification must serve a compelling government interest. Second, it must be tailored narrowly to further that interest. *Id*. at 235.

381. Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997).

382. Adarand Constructors, Inc. v Slater, 169 F.3d 1291, 1296 (10th Cir. 1999).

383. *Id*. at 1299. In rejecting Adarand's argument against mootness, the court declared: "The circumstances causing mootness in this case were precipitated by the actions of a third party [the state of Colorado] and Adarand itself, not by the federal government." *Id.* Moreover, the court decided that if it did not vacate the judgment, the government would be bound by a district court opinion on a "matter of great constitutional importance" without the benefit of appellate review. *Id*. The court opted not to reach such a result, but relied instead on its constitutional duty to "address only live cases and controversies." *Id*.

surprise at the Tenth Circuit's opinion, and predict more chapters in this already long saga.[384] Watch for more developments in next year's millennium edition.

*Post-*Adarand *Reforms Implement Affirmative Action*

In the wake of *Adarand*, agencies have rushed to reform affirmative action in federal procurement. Effective 1 October 1999, the Civilian Agency Acquisition Council issued a final rule amending numerous sections of the FAR to conform to the *Adarand* constitutional standards.[385] The final rule focuses primarily on procurement tools benefiting SDBs. For example, the rule establishes a price evaluation adjustment of up to ten percent in certain two-digit SIC major groups.[386] It also includes a source selection evaluation factor or subfactor for planned SDB participation in contract performance.[387] Finally, the rule offers contractors a monetary incentive for subcontracting with SDBs.[388]

Labor Standards

The Service Contract Act (SCA)[389]

Agency Fails to Justify Awardee's Use of Cheaper, Unlisted Labor Category

The RFP in *E.L. Hamm & Assocs., Inc.*,[390] contemplated award of a cost-reimbursement contract for storage and warehouse services. It included a Department of Labor (DOL) wage determination listing various employee classifications to be used on the contract. The solicitation also incorporated a standard clause that identified the types of service employees the agency expected would perform under the contract.[391] For a significant portion of the work, however, the awardee proposed a labor category not listed in the RFP. Likewise, the wage rate for this category was substantially lower than that for the similar category set forth in the RFP.[392] During its source selection, the agency determined ultimately that the employee type proposed by the awardee would be suitable for the contract. E.L. Hamm disagreed and protested to the GAO. It argued the agency should have increased the awardee's proposed costs to reflect the probable cost of performing with more qualified, higher paid employees.

The GAO sustained the protest. It found that the agency had not demonstrated the work under the contract was covered by the labor category adopted by the awardee. The GAO also concluded that the awardee had gained an unfair competitive advantage because the RFP listed a specific labor category and wage rate and all other offerors had proposed on that basis. The agency should have adjusted the awardee's proposed costs upward or amended the solicitation to reflect the labor category it believed was suitable for the work.[393]

384. *See, e.g.*, *Contractor's DBE Certification Moots Challenge To Affirmative Action Program*, 41 THE GOV'T CONTRACTOR NO. 12, at 4 (Mar. 24, 1999).

385. 64 Fed. Reg. 36,222 (1999) (codified at scattered sections of FAR Parts 19, 26, and 52). The Council adopted, with changes, the interim rules published at 63 Fed. Reg. 35,719 (1998), 63 Fed. Reg. at 36,120, 63 Fed. Reg. at 52,426, and 63 Fed. Reg. at 71,721. *See 1997 Year in Review*, *supra* note 3, at 42 (discussing the price adjustment provisions for SDBs).

386. *See* FAR, *supra* note 17, at 19.1101-04.

387. *Id*. at 19.1202-03. The evaluation factor or subfactor would be used in competitive, negotiated acquisitions expected to exceed $500,000 in value ($1 million for construction). The factors or subfactors would not be used in small business set-asides or 8(a) acquisitions. *Id*. at 19.1202-3. When the solicitation includes the SDB participation factor or subfactor, it shall require offerors to include with their offers "targets." These targets, expressed in dollars and percentages of total contract value, represent the offerors' projected SDB participation for the contract. An SDB offeror that waives the SDB price evaluation adjustment must include a target for the work it intends to perform as a prime contractor. *Id*. at 19.1202-4.

388. *Id*. at 19.1203. The monetary incentives are based on actual achievement of subcontracting opportunities as compared to proposed monetary targets for SDB subcontracting. *Id*.

389. 41 U.S.C.A. §§ 351-358 (West 1999).

390. B-280766.3, Apr. 12, 1999, 99-1 CPD ¶ 85.

391. *See* FAR, *supra* note 17, at 52.222.42 (Statement of Equivalent Rates for Federal Hires). Some of the employee classifications listed were: warehouse specialist, shipping/receiving clerk, data entry, general clerk, stock clerk, and truck driver.

392. The specific listed and unlisted labor categories in dispute are unclear. The GAO redacted facts from the published opinion that would allow readers to compare rates or job descriptions. *E.L. Hamm*, 99-1 CPD ¶ 85 at 3.

393. *Cf.* Spotless Janitorial Services, Inc. v. General Services Administration, GSBCA No. 14651, 99-1 BCA ¶ 30,311. In *Spotless Janitorial*, the contract required the use of "on-site janitorial supervisors," but did not include a DOL wage rate for such employees. Likewise, the contractor failed to initiate a conformance action with the DOL to ensure it paid the proper wage to its supervisors. *See* FAR, *supra* note 17, at 52.222-41(c)(2). After several years of performance, the DOL found that Spotless Janitorial had underpaid its supervisors and required the contractor to pay the difference retroactively. The contracting officer denied Spotless's claim for these additional costs and the board agreed. It ruled that although the government failed to include a wage determination for on-site supervisors, Spotless had a contractual duty to consult the DOL on the matter, and its failure to do so barred recovery of the retroactively applicable costs. *Id*. at 149,880.

Contractor Bound by the Terms of a Rescinded Collective Bargaining Agreement

Ashford v. United States[394] involved a dispute concerning wage rates applicable under a follow-on janitorial services contract at an Army installation. Initially, the IFB for this contract incorporated a DOL wage determination that reflected wage rates prevailing in the area. The contracting officer subsequently substituted by amendment substantially higher rates[395] established by a collective bargaining agreement (CBA) the parties believed mistakenly was effective under the previous contract.[396] Although Ashford acknowledged the amendment, it bid as if the prevailing wage rates applied to the follow-on effort. Ashford later abandoned the work because it was unable to pay the CBA wages, and the contracting officer terminated Ashford for default.

On appeal, Ashford argued, in part, that because the previous contractor had rescinded the CBA, the rates established under that agreement should not have applied to the follow-on services. Ashford contended that a contract requirement to pay wages established by a nonexistent CBA was null and unenforceable by the contracting officer.[397] The court disagreed, however, and noted that only the DOL could decide a labor standard dispute of this nature. Even if Ashford questioned the applicability of CBA-mandated wage rates, it could not disregard the rates outright and was required to pay them unless the DOL granted relief.[398]

Appeals Court Finds Contractor's Violation of SCA Wage Payment Provisions Did Not Support Debarment

The SCA does not specify how often contractors must pay their employees. The DOL regulations, which have the force and effect of law,[399] however, call for pay periods no longer than "semimonthly."[400] Thus, if a contractor pays its workers less frequently, it has failed to comply with the SCA and may be subject to debarment.[401]

In *Dantran, Inc. v. United States Department of Labor*,[402] the First Circuit Court of Appeals struggled with this issue. For years, Dantran, a Postal Service contractor, paid its employees monthly. When Dantran was audited once for SCA compliance, DOL officials did not question this practice. A subsequent investigation, however, noted this violation, and Dantran took remedial steps immediately. Nevertheless, the investigator recommended debarment, and the case went before an administrative law judge (ALJ), [403] who found in Dantran's favor. In part, the ALJ concluded that the violation was not in culpable disregard of the law and that mitigating circumstances existed.[404] On appeal by the Secretary of Labor, the Administrative Review Board (ARB)[405] found that Dantran should be debarred. According to the ARB, culpable disregard was apparent because DOL officials had given Dantran a copy of the regulations during the initial audit.[406] The district court affirmed the ARB decision.

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394. *Ashford*, 43 Fed. Cl. 1 (1997). Although this is a 1997 case, the court reissued its decision for publication in February 1999. *See id.* at 1.

395. Ashford claimed the CBA rates were 33% higher than the prevailing wages. *Id*. at 2.

396. *Id*. at 2, 3. *See* 29 C.F.R. § 4.163 (1999) (requiring successor contractor to pay wages and fringe benefits at least equal to those in a CBA effective under the previous contract). During the resolicitation, even the DOL believed the CBA was still in force. In fact, the predecessor contractor had rescinded the CBA more than a year before the follow-on contract was awarded. *Ashford*, 43 Fed. Cl. at 3.

397. *Ashford*, 43 Fed. Cl. at 4.

398. *Id.* at 5.

399. *See* 41 U.S.C.A. § 353(a) (West 1999) (providing the Secretary of Labor specific authority to "make rules, regulations, issue orders . . ." under the SCA). *See also* Dantran, Inc. v. United States Dep't of Labor, 171 F.3d 58, 65 (1st Cir. 1999) (noting that DOL regulations "become part of the warp and woof of the Act's enforcement scheme" and "constitute binding law").

400. *See* 29 C.F.R. § 4.165(b).

401. *See* 41 U.S.C.A. § 354(a) (barring agencies from awarding contracts to those found by the Secretary of Labor to have violated the SCA); 29 C.F.R. § 4.188(b)(1) (limiting Secretary's discretion to "relieve violators from the debarred list").

402. 171 F.3d 58 (1st Cir. 1999).

403. *See* 29 C.F.R. § 6.19.

404. The ALJ found that Dantran had not violated the SCA culpably, willfully, or deliberately because it had relied on the first DOL investigation that gave it a clean bill of health. Additionally, the ALJ found that Dantran otherwise had complied strictly with the SCA and had cooperated during the DOL investigations. *Dantran*, 171 F.3d at 62.

405. *See* 29 C.F.R. § 6.20.

406. *Dantran*, 171 F.3d at 62.

On appeal, the First Circuit reversed the lower court and adopted the findings of the ALJ. It rejected the ARB's determination that Dantran's violation of the SCA was culpable merely because the pay period provision was unambiguous. The court concluded that while Dantran may have violated the SCA, debarment was not warranted in view of the mitigating factors and lack of aggravating circumstances.

Agency Could Set Minimum Wages Above SCA-Mandated Levels

In *General Security Services Corp.*,[407] the U.S. Marshals Service sought proposals for court security services. The RFP included a provision requiring offerors to propose specific wage rates above the minimum wages established by the DOL for court security officers (CSO). General Security Services protested claiming that mandating rates in excess of those set by DOL violated the SCA. The protester also argued that normalizing CSO labor rates was improper because doing so precluded price competition and limited the government's ability to save money.[408]

The GAO opined, however, that normalization was proper in this case because the agency had a clear need to prevent labor unrest that was certain to occur if CSOs were paid less than what they had received from the previous contractor.[409] The GAO also concluded that setting a wage rate above the minimum was not contrary to law because the SCA requires only that contractors pay no less than prescribed rates.[410]

The Davis-Bacon Act (DBA)[411]

Contractor Entitled to an Equitable Adjustment Where Government Fails to Incorporate Revised Wage Determination

In *Twigg Corp. v. General Services Administration*[412] the appellant bid on a contract to renovate a federal office building. In pricing its offer, Twigg relied on a subcontract estimate, the labor portion of which was based on the IFB's wage determination (WD-01). The contracting officer opened bids on 8 September. On 6 October, the agency received, but did not incorporate into the IFB, a revised wage determination (WD-03) increasing electricians rates by fifty-two cents per hour. More importantly, the agency did not award the contract to Twigg until 22 December.[413] Shortly after award, the contracting officer substituted WD-03 for WD-01 as a "no-cost change." A month later, however, the contracting officer rescinded the modification, deleting WD-03 and reinstating WD-01. Twigg, nevertheless, continued to pay the higher WD-03 rate, but the agency denied its claim for the increased costs.[414]

On appeal, the GSA conceded that WD-03 applied to the contract. The DOL had published the new wage rates after bid opening but before contract award, and the contracting officer did not award to Twigg within ninety days of bid opening.[415] The GSA argued, however, that because Twigg otherwise was bound to pay the WD-03 rate under a local CBA, WD-03's absence was inconsequential.[416] The board rejected this contention and found that the FAR mandated an equitable adjustment where Twigg had based its bid on WD-01 and had not padded its contract price for potential wage rate increases.[417]

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407. B-280959, Dec. 11, 1998, 98-2 CPD ¶ 143.

408. *Id*. at 3. Normalization occurs when agencies measure offerors' prices or costs against the same baseline where there is unlikely to be any difference in technical approach or methodology. Common "should cost" estimates result. *See* Moshman Assocs., Inc., B-192008, Jan. 16, 1979, 79-1 CPD ¶ 23.

409. *General Security*, 98-2 CPD ¶ 143 at 3. The agency cited specific morale problems and discord that had occurred when the agency awarded follow-on contracts to offerors who paid CSOs lower wages than the CSOs were accustomed to.

410. *Id*. at 4, n.2.

411. 40 U.S.C.A. § 276a (West 1999).

412. GSBCA No. 14639, 99-1 BCA ¶ 30,217.

413. *Id.* at 149,494.

414. *Id*. at 149,494-95.

415. *Id*. at 149,495. The FAR provides that where award is not made within 90 days of bid opening, any modification of a wage determination published in the Federal Register before award will be effective for the contract unless the DOL approves an extension of the period. *See* FAR, *supra* note 17, at 22.404-6.

416. *Twigg Corp*., 99-1 BCA ¶ 30,217 at 149,496.

417. *Id*. at 149,496-97. *See* FAR, *supra* note 17, at 22.404-5(b)(2) (providing for equitable adjustments where changed wage rates increase or decrease the cost of contract performance).

Absence of Area Wage Determination Does Not Shield Contractor from Potential Liability for Miscertifying Compliance with DBA

A contractor at a federally-funded wastewater treatment plant classified and paid as "laborers," employees who did piping work at the site.[418] In certifying its weekly payroll,[419] the contractor affirmed that it had paid its workers "not less than the applicable wage rates . . . ."[420] The local union challenged this certification and filed a False Claims Act[421] suit contending that a union agreement required the contractor to classify piping workers as plumbers and steamfitters, a category with a higher wage rate. The federal district court, however, granted summary judgment for the contractor finding that: (1) because there was no DOL area wage survey for the project, a jury could not reasonably find the contractor had presented a false claim "knowingly," and (2) there was confusion at the DOL about the applicable wage rates for the area.[422]

On appeal, the Ninth Circuit Court of Appeals held that summary judgment was improper because "an area practice survey is not a prerequisite to the determination of prevailing wage rates or job classifications" under a DBA-covered contract. It also found that any uncertainty concerning the proper wage rate arose after the contractor had made the alleged false certifications.[423] The court also found the contractor knew that only the DOL may determine prevailing rates. Thus, the district court would be obliged to develop the record and determine, in part, whether the contractor had certified its payroll in "reckless disregard" of the proper rate without seeking clarification from the DOL.[424]

Fair Labor Standards Act (FLSA)[425]

Court of Federal Claims May Hear Overtime Pay Claims of Nonappropriated Fund Instrumentality (NAFI) Employees

In *El-Sheikh v. United States*,[426] a former employee at the Bolling Air Force Base Officers' Club sued in federal district court for $40,000 in overtime pay that he alleged was due under the FLSA.[427] The government moved successfully to dismiss arguing that the amount in controversy exceeded $10,000, but the parties agreed that the COFC was the proper forum. Upon transfer to the COFC, that court granted the government's motion to dismiss holding that it lacked jurisdiction under the Tucker Act[428] to enter a judgment against the United States for a liability of the club.

The CAFC reversed. It ruled first that the COFC had jurisdiction and that the FLSA contained a waiver of sovereign immunity for suits brought by NAFI employees.[429] It also declined to apply the "nonappropriated funds doctrine"[430] because to do so would be inconsistent with Congress's intent to allow NAFI employees a cause of action under the FLSA.[431]

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418. United States *ex rel*. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co., 183 F.3d 1088, 1090 (9th Cir. 1999).

419. *See* 29 C.F.R. § 5.5(a)(3)(ii)(B) (1999).

420. *C.W. Roen Constr.*, 183 F.3d at 1090.

421. 31 U.S.C.A. § 3729 (West 1999).

422. *See* United States *ex rel*. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co., 1997 U.S. Dist. LEXIS 14310 (N.D. Cal. Sept. 16, 1997). The district court noted that it normally would not assert jurisdiction over a matter left to the DOL for resolution (i.e., proper classification of employees). It concluded, nevertheless, that the DOL's determination would not affect the court's finding that the contractor had not falsified its payroll certifications.

423. *C.W. Roen Constr.*, 183 F.3d at 1094.

424. *Id*. at 1095.

425. 29 U.S.C.A. §§ 201-219 (West 1999).

426. 177 F.3d 1321 (Fed Cir. 1999).

427. Under the FLSA, covered employees, which include NAFI personnel, are entitled to overtime pay at a rate of one and one half times the normal wage. 29 U.S.C.A. § 207(a)(1) (West 1999). El-Sheikh also sought liquidated damages of $40,000. *El-Sheikh*, 177 F.3d at 1323.

428. 28 U.S.C.A. § 1491 (a)(1) (West 1999) (providing that the COFC has jurisdiction over claims against the United States founded upon any acts of Congress).

429. *El-Sheikh*, 177 F.3d at 1324.

430. The COFC will not enter a judgment against the United States for a claim brought against a NAFI unless Congress has provided that appropriated funds are available for the obligations of the NAFI. *Id*. *See* United States v. Hopkins, 427 U.S. 123 (1976); Interdent Corp. v. United States, 488 F.2d 1011 (1973).

431. *El-Sheikh*, 177 F.3d at 1325.

Bonds and Sureties

Congress Amends Miller Act[432]

On 17 August 1999, the President signed the Construction Industry Payment Protection Act of 1999.[433] This statute amends the Miller Act in three significant ways. First, the amendment requires contractors to post payment bonds in an amount equal to the contract price[434] unless the contracting officer determines that the amount of the payment bond is impractical.[435] Second, the amendment permits claimants to serve their claims notices on the prime contractor by "any means which provides written, third-party verification of delivery."[436] Finally, the amendment limits the ability of a contractor to require its subcontractors and suppliers to waive their right to sue on the payment bond. According to the statute, a waiver is void unless the subcontractor or supplier executes the waiver in writing after furnishing the labor or materials used to perform the contract.[437]

Surety that Fails to Take Over Contract Cannot Sue for Costs and Damages on the Terminated Contractor's Behalf

On 7 January 1992, the Navy awarded a contract to Admiralty Construction, Inc. to construct a building at the Patuxent Naval Air Station in Maryland for $117,105.[438] Admiralty then executed a general agreement of indemnity (GAI) with National American Insurance Company to acquire the bonds it needed to perform the contract.[439] This agreement permitted National to exercise all of Admiralty's rights, including Admiralty's right to recover monies due under Admiralty's contract with the Navy. In addition, this agreement nominated National as Admiralty's attorney-in-fact.

On 11 June 1993, the Navy terminated Admiralty's contract for default. National could have taken over and completed the contract at this point,[440] but waived this right. Instead, National simply recommended a replacement contractor.[441] On 10 January 1995, the Navy's contracting officer issued a final decision asserting a $69,785 claim against Admiralty for excess reprocurement costs and liquidated damages. Interestingly enough, both National and Admiralty appealed–albeit to two different fora. National appealed to the ASBCA on Admiralty's behalf,[442] and Admiralty appealed to the COFC.[443]

National alleged that it had standing to appeal as a subrogated surety.[444] The ASBCA disagreed. Concluding there was no legal precedent to support National's subrogation claim, the ASBCA dismissed National's appeal unanimously. National then appealed to the CAFC.

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432. 40 U.S.C.A. § 270a-f (West 1999).

433. Pub. L. No. 106-49, 113 Stat. 231.

434. *Id*. at § 2(a). In the past, the Miller Act limited the amount of the payment bond. If the contract price was less than $1,000,000, the contractor had to post a payment bond equal to 50% of the contract price; if the contract price was between $1,000,000 and $5,000,000, the contractor had to post a payment bond equal to 40% of the contract price; and if the contract price exceeded $5,000,000, the contractor had to post a $2,500,000 payment bond. 40 U.S.C.A. § 270a(a)(2) (West 1999).

435. Pub. L. No. 106-49, § 2(a). The contracting officer must set the amount of the payment bond if the contracting officer determines that it is impractical to require a payment bond in an amount equal to the contract price. However, the amount of the payment bond must equal or exceed the amount of the performance bond, which is generally 100% of the contract price. *Id. See* FAR, *supra* note 17, at 28.102-2(a) (requiring the amount of the payment bond to equal 100% of the contract price, unless the contracting officer determines that a lesser amount will protect the government adequately); *cf.* 40 U.S.C.A. § 270a(a)(1) (West 1999) (requiring the contracting officer to set the amount of the performance bond at a level that will protect the government adequately). Therefore, the contracting officer will have to lower the amount of the performance bond if the contracting officer wants to reduce the amount of the payment bond.

436. Pub. L. No. 106-49, § 2(b). In the past, the Miller Act required the claimants to serve their claims notices on the prime contractor by "mailing [the notice] registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons." 40 U.S.C.A. § 270b(a).

437. Pub. L. No. 106-49, § 2(c).

438. Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 (Fed. Cir. 1998).

439. *Id*. at 1218. The contract required Admiralty to provide: (1) a performance bond in an amount equal to one hundred percent of the contract amount ($117,105), and (2) a payment bond in an amount equal to 50% of the contract amount ($58,552.50). *Id.* at 1219.

440. *Id. See* FAR, *supra* note 17, at 49.404 (detailing the requirements for surety-takeover agreements).

441. *Admiralty Constr., Inc.*, 156 F.3d at 1219. The CAFC stated that National "did nothing else under its performance bond to assume or accept responsibility for the completion of the contract." *Id*.

442. *Id.* National styled the appeal: "Admiralty Construction, Inc., by National American Insurance Company, its Surety." *Id. See* Admiralty Constr., Inc., by National Am. Ins. Co., its Surety, ASBCA No. 48627, 96-2 BCA ¶ 28,280.

443. *Admiralty Constr., Inc.*, 156 F.3d at 1219. The COFC stayed Admiralty's suit pending the outcome of National's appeal. *Id*. *See* Admiralty Constr., Inc. v. United States, No. 95-428C (Fed. Cl. June 19, 1997).

The CAFC began its analysis by noting that National did not meet two of the jurisdictional requirements set forth in the CDA. First, National was not a "contractor" within the meaning of the CDA.[445] Second, National never entered into a contract with the Navy.[446] As a result, the CAFC held that National lacked standing to appeal the contracting officer's final decision on its own.[447]

The CAFC then addressed–and rejected–each of National's three remaining allegations. The CAFC rejected National's allegation that it had standing to appeal based on the court's decision in *Balboa Insurance Co. v. United States*[448] because *Balboa* did not give a surety any contractual rights against the government. The court in *Balboa* merely recognized a surety's right to sue the government under the doctrine of equitable subrogation.[449] Next, the CAFC rejected National's allegation that it had standing to appeal under the doctrine of equitable subrogation because National did not take over or finance the completion of the contract.[450] Finally, the CAFC rejected National's allegation that it had standing to appeal based on its indemnification agreement with Admiralty because the court lacked jurisdiction to construe or enforce the GAI.[451] The CAFC concluded that National lacked standing to appeal the contracting officer's final decision and affirmed the ASBCA's decision to dismiss the appeal.[452]

Surety Must Pay Subcontractor "Sums Justly Due" Under "Savings" Clause

In *Taylor Construction, Inc. v. ABT Service Corp.*,[453] ABT Service Corporation (ABT) subcontracted with Taylor Construction to perform the excavating, utility digging, and foundation work for its prime contract with the Idaho National Engineering Laboratory. The subcontract indicated that ABT would reimburse Taylor for its material, labor, and equipment, and it included the following "savings" clause:

> For the sum of: total contract amount shall not exceed $150,000.00 [and] any savings realized in this work shall be divided evenly between the [prime] contractor and the subcontractor.

Taylor subsequently performed the subcontract work and received $42,819 for its material, labor, and equipment. However, neither ABT nor its surety, International Fidelity Insurance Company, would pay Taylor the $41,405.68 required by the "savings" clause.[454] As a result, Taylor sued ABT and International.

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444. *Admiralty Constr., Inc.*, 156 F.3d at 1219. National alleged that it was subrogated to Admiralty's rights because it had paid Admiralty's workers and suppliers the full amount of the payment bond. In addition, National alleged that it was subrogated to the government's rights because it had recommended the replacement contractor that ultimately completed the contract. *Id*.

445. *Id*. at 1220-21. The CDA defines the term "contractor" as "a party to a Government contract other than the Government," and limits claims brought under the Act to claims brought "by a contractor against the Government" and claims brought "by the Government against a contractor." 41 U.S.C.A. §§ 601(4), 605(a) (West 1999).

446. *Admiralty Constr., Inc.*, 156 F.3d at 1221. The CDA only applies to contracts entered into by an executive agency. 41 U.S.C.A. § 602. *See id*. § 601(2) (defining the term "executive agency").

447. *Admiralty Constr., Inc.*, 156 F.3d at 1221. The CAFC noted that National's attempt to appeal to the ASBCA contravened the CDA's goal of preventing multiple, duplicative claims since Admiralty had already brought suit on the same claim in the COFC. *Id*.

448. 775 F.2d 1158 (Fed. Cir. 1985).

449. *Admiralty Constr., Inc.*, 156 F.3d at 1221. National apparently relied on the following language in *Balboa*: "[A] surety, as bondholder, is as much a party to the Government contract as the contractor. If the surety fails to perform, the Government can sue it on the bonds." *Id*. (quoting Balboa Ins. Co. v. United States, 775 F.2d 1158, 1160 (Fed. Cir. 1985)). However, the CAFC clarified this language in *Ransom v. United States*, where the court stated that:

> *Balboa* did not hold a surety has contractual rights against the government . . . [Rather] this court merely held that the government becomes a "stakeholder" for remaining contract proceeds when a payment and performance bond surety notifies the government that the surety's interest is in jeopardy because of default by the contractor.

Id. at 1222 (quoting Ransom v. United States, 900 F.2d 242, 245 (Fed. Cir. 1990)).

450. *Admiralty Constr., Inc.*, 156 F.3d at 1222 (citing Aetna Cas. & Sur. Co. v. United States, 845 F.2d 971, 975 (Fed. Cir. 1988) for the proposition that a surety must take over or finance the completion of a defaulted contract under its performance bond to maintain a claim for equitable subrogation).

451. *Id*. at 1222. The CAFC lacked jurisdiction because the CDA does not give it the power to construe or enforce an agreement between a contractor and a surety. *Id*.

452. *Id.* at 1223.

453. 163 F.3d 1119 (9th Cir. 1998).

454. *Id.* at 1121. The gross savings under the subcontract was $107,180; however, Taylor agreed to reduce its share from $53,590 to $41,405.68 because ABT had provided it with a laborer when it was performing the subcontract. *Id.* at n.1.

After the district court granted summary judgment to Taylor and ordered International to pay Taylor the entire amount due under Taylor's subcontract with ABT, International appealed to the Ninth Circuit Court of Appeals. International argued that the Miller Act did not require it to pay the amount due under the "savings" clause because its Miller Act obligations arise only when a prime contractor fails to pay for labor or materials. The Ninth Circuit disagreed.

In concluding that International's interpretation of the Miller Act was wrong, the Ninth Circuit examined both the plain language of the Miller Act and "long-standing precedent."[455] According to the Ninth Circuit, the Miller Act permits a proper claimant to recover "sums justly due,"[456] which the court interpreted to mean the full amount due under the claimant's subcontract.[457] Therefore, the Ninth Circuit held that Taylor could recover the full amount due under its subcontract with ABT, including the sum under the "savings" clause.[458]

District Court Acknowledges Split of Authority; Holds that Miller Act Time Constraints Are Jurisdictional

In *United States* ex rel. *J.D.M. Materials Co. v. Fireman's Fund Insurance Co.*,[459] J.D.M. Materials Co. agreed to provide concrete to a subcontractor on a Navy contract in Philadelphia.[460] When the subcontractor failed to pay J.D.M. for the concrete it had supplied from 1 July 1997 to 24 September 1998, J.D.M. asked the Navy for information regarding the payment bond. Unfortunately, the Navy's project manager told J.D.M. that the subcontractor, Brosius Construction Consultants, Inc., was the prime contractor. This was not true, but J.D.M. did not discover the mistake until sometime after 15 January 1998.

On 19 February 1998, J.D.M. filed its proof of claim with the prime contractor, J.A. Jones Management Services, Inc., at the prime contractor's request. J.D.M. then attempted to obtain a copy of the payment bond, which it finally received on 26 August 1998. Yet, J.D.M. did not immediately sue Fireman's Fund Insurance Co. Instead, J.D.M. waited until 30 September 1998.

In response to J.D.M.'s suit, Fireman's Fund moved to dismiss. Fireman's Fund alleged that J.D.M.'s complaint was untimely, and the district court agreed. J.D.M. did not file its proof of claim with the prime contractor until 147 days after the last day it supplied concrete materials for the Navy contract, and it did not sue Fireman's Fund until 371 days after that day. As a result, J.D.M. failed to meet the Miller Act time limits.[461]

In rejecting J.D.M.'s request that it toll the Miller Act time limits,[462] the district court noted that the time limits are not subject to equitable tolling in the Third Circuit because they are jurisdictional.[463] The district court then noted that J.D.M. was partially responsible for the delays in notifying the prime con-

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455. *Id.* at 1122. Taylor originally brought suit under the Alabama version of the Miller Act; however, the Ninth Circuit relied on Miller Act precedent because "the Alabama statute was patterned upon the Miller Act," "the purposes of the Miller Act and the Alabama statute are identical," and "they should be interpreted in the same manner." *Id.* at n.3.

456. *Id.* at 1122. The Miller Act states that:

> Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished . . . and who has not been paid in full therefor . . . shall have the right to sue on such payment bond for . . . the sum or sums justly due him . . . .

41 U.S.C.A. § 270b(a) (West 1999).

457. *Taylor Constr., Inc.*, 163 F.3d at 1122-23. The Ninth Circuit decided that it should construe the Miller Act liberally because the statute is remedial. *Id.* at 1122. The court then discussed several cases to support its conclusion that the terms of the underlying contract govern the amount a subcontractor or supplier can recover under the Miller Act. *Id.* at 1122-23.

458. *Id.* at 1123.

459. No. 98-CV-5186, 1999 U.S. Dist. LEXIS 1231 (E.D. Pa. Feb. 3, 1999).

460. *Id.* at *2. The contract was for the Navy's Communications Center Project. *Id.*

461. *Id.* at *4. The Miller Act requires a sub-subcontractor to give the prime contractor notice of its claim within ninety days of the last day it performed labor or supplied materials for the contract. 40 U.S.C.A. § 270b(a) (West 1999). In addition, the Miller Act requires a sub-subcontractor to sue the surety within one year of the last day it performed labor or supplied materials for the contract. 40 U.S.C.A. § 270b(b).

462. *J.D.M. Materials Co.*, 1999 U.S. Dist. LEXIS 1231, at *8. The district court noted that equitable tolling is generally appropriate where: (1) the defendant actively misled the plaintiff regarding the plaintiff's cause of action, (2) extraordinarily circumstances prevented the plaintiff from asserting its rights, or (3) the plaintiff timely asserted its rights in the wrong forum. *Id.* at *7. In this case, J.D.M. requested the court to toll the Miller Act time limits because of the Navy's alleged interference with its attempts to identify the prime contractor and the surety. *Id.* at *8.

463. *Id.* at *5. The district court acknowledged that other federal circuits analogize the Miller Act time constraints to a statute of limitations and permit equitable tolling; however, the district court concluded correctly that it was bound by the Third Circuit's precedent. *Id.*

tractor[464] and filing its suit against the surety.[465] Therefore, J.D.M. could not prevail, even if the Miller Act permitted equitable tolling.

Government's Promise to Release Payment Bond Upon Final Acceptance of Work Violates Public Policy

On 20 July 1993, the USACE awarded a contract to ENCORP International, Inc. for construction work in Bahrain.[466] ENCORP then furnished a letter of credit and signed a "Collateral Agreement" with the National Union Fire Insurance Company to acquire the bonds it needed to perform the contract. The "Collateral Agreement" stated that National would return ENCORP's letter of credit when it received "competent written legal evidence of the Surety's discharge or release from the Bonds" and its statutory liability expired.[467]

During contract performance, the USACE and ENCORP executed a bilateral contract modification (Modification P00012) to increase the contract price and extend the contract completion date.[468] Among other things, this modification stated that: "The Government agrees to promptly release all Bonds upon final acceptance of all work under this contract . . . ."[469] On 14 September 1994, the USACE accepted all of the work under the contract, and ENCORP asked the USACE to release its bonds the next day. In response, the contracting officer returned only ENCORP's performance bond. The contracting officer refused to return ENCORP's payment bond, arguing that she lacked authority to declare that ENCORP had paid all of its subcontractors and suppliers.

Because of the contracting officer's refusal to return ENCORP's payment bond, National refused to release ENCORP's letter of credit. Instead, National told ENCORP that it would retain the letter of credit for one year from the date of final acceptance unless the USACE agreed to indemnify it. As a result, ENCORP asked the contracting officer to modify the contract to compensate it for the monthly expense of maintaining the letter of credit. ENCORP then submitted a certified claim for $92,877 after the contracting officer refused to do so.

In its subsequent appeal to the ASBCA, ENCORP argued that it should recover under one of three theories. First, ENCORP argued that the USACE breached its contract with ENCORP by failing to comply with its promise to release its bonds promptly. Second, ENCORP argued that the ASBCA should reform Modification P00012 to require the USACE to bear the costs of maintaining ENCORP's bonds after final acceptance. Finally, ENCORP argued that the ASBCA should rescind Modification P00012 so that it could submit the claim it waived in exchange for the USACE's promise to promptly release its bonds.

The ASBCA rejected ENCORP's first two arguments summarily. The ASBCA held that the USACE's promise to release ENCORP's bonds promptly was unenforceable because allowing ENCORP to avoid full compliance with the Miller Act would have been contrary to public policy.[470] In addition, the ASBCA held that it could not reform Modification P00012 because ENCORP could not show that the USACE would have agreed to bear the costs of maintaining ENCORP's bonds if it had known the true facts about payment bond indemnification period.[471] The ASBCA nevertheless sustained ENCORP's appeal based on its final argument. The ASBCA concluded that the USACE's promise to release ENCORP's bonds promptly was an "essential part" of ENCORP's agreement to release its claims against the USACE.[472] Therefore, the ASBCA held that the government could not enforce ENCORP's releases against it.[473]

Bid Protests

While the number of protests *filed* at GAO continues to decrease, the number of protests *sustained* by GAO continues to increase.[474] The decrease may be a result of increased interest in both GAO's alternative dispute resolution and the COFC's new bid protest jurisdiction.[475] With the sunset of the

464. *Id*. at *8. J.D.M. knew the identity of the prime contractor on or about 15 January 1998. Yet, J.D.M. did not file the proof of claim until the prime contractor asked for it. *Id*. at *3, *8.

465. *Id*. at *9. After J.D.M. filed the proof of claim, it waited three months before it resumed its search for the payment bond. In addition, J.D.M. did not sue Fireman's Fund until 30 September 1998 even though it received the payment bond and identified the surety on or about 26 August 1998. *Id*. at *3, *9.

466. ENCORP Int'l, Inc., ASBCA Nos. 49474, 49619, 99-1 BCA ¶ 30,254.

467. *Id.* at 149,607.

468. *Id.* The parties executed the modification to compensate ENCORP for the late delivery of government-furnished equipment. *Id.*

469. *Id.*

470. *Id.* at 149,608.

471. *Id.* at 149,609.

472. *Id*.

473. *Id*.

district courts' statutory protest jurisdiction scheduled for 1 January 2001, it will be interesting to watch what, if any, impact the demise of that protest forum will have on both the protest filing numbers and the sustained protest rates at the GAO and the COFC.

GAO: "Late Is Late" Doesn't Apply Just To Receipt Of Bids

Everyone knows the GAO's golden rule–"late is late."[476] While most people ordinarily use that phrase when discussing a protest filing, some forget that the "late is late" concept applies equally to the sixty-day time limit allowed for a successful protester to file a claim with an agency to recover its protest costs.[477] In an interesting case, which says loud and clear to protesters that the GAO's timelines are not something to be taken lightly, the GAO denied a successful protester's claim for costs because the protester failed to file a legally sufficient claim within the time required.

In *Aalco Forwarding, Inc.*,[478] the protesters requested that the GAO recommend the amount of reimbursement for filing and pursuing their protests against the Military Traffic Management Command (MTMC), which the GAO had sustained previously.[479] Within sixty days of the GAO's decision sustaining the protests, the protesters' attorneys filed certified claims with the agency.[480] Upon receiving the claim, the agency requested supporting documentation and information from the protesters' attorneys.[481] After the protesters' attorneys did not respond, MTMC denied the claim.[482]

In a letter to MTMC, the protesters' attorneys objected to MTMC's denial of their claim and argued that MTMC had not established a deadline for receipt of the supporting documentation.[483] The protesters' attorneys included in their letter additional substantiation of their claim.[484] In response to the protesters' letter, MTMC restated the agency's position that the protesters' attorneys had failed to submit an adequately detailed claim within the required sixty-day timeframe. The protesters' attorneys requested that the GAO determine the amount that they should be reimbursed.

The GAO concluded that the record showed that the protesters' initial claim submission to MTMC was insufficient to

474. Martha A. Matthews, *Bid Protests: GAO Protests Drop 11 Percent in FY '99; Sustain Rate Is Up, Hearings Are Down*, Fed. Cont. Daily (BNA) (Sept. 22, 1999), *available in* LEXIS, News Library, BNAFCD file. As of 15 September 1999, 1268 protests were filed before the GAO compared to 1566 protests filed in fiscal year 1998. The GAO Senior Associate General Counsel for Procurement Law, Mr. Anthony Gamboa, stated that the reason for the decrease in protest filings appears to be agencies' growing use of multiple award indefinite task/delivery order contracts and the federal supply schedules. *Id.* As for the sustain rate, the GAO has sustained 22% of the protests reviewed, an increase in 6% from the fiscal year 1998 sustain rate of 16%. *Id.*

475. *Id.* The GAO reports that it handled 81 cases in its alternative dispute resolution process in fiscal year 1999, with a success rate of 93%. "Success" means that the case is resolved without the need for a decision on the merits. *Id.* The numbers at the COFC for the calendar year 1998 include: 12 protests carried forward from calendar year 1997; 33 protests filed; 27% protests closed; 2 protests sustained; 8 protests dismissed; 2 protests settled; 15 protests denied; 18 protests pending; and 6 protests appealed from the COFC's decision. *Court of Federal Claims Ends Year with Record 33 Postaward Protests Filed*, 71 Fed. Cont. Rep. (BNA) 41 (1999). In calendar year 1997, 28 post-award bid protests were filed before the court. The number of sustained protests was the same in both 1997 and 1998. *Id.*

476. The phrase "late is late" is used frequently by practitioners to refer to the GAO's stringent timeline that a protester must meet in filing its protest.

477. *See generally* 4 C.F.R. § 21.8(f)(1) (1999) (requiring a protester to file its claim for costs with the contracting agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs).

478. B-277241.30, 1999 U.S. Comp. Gen. LEXIS 134 (July 30, 1999).

479. *Id*. at *1. Aalco Forwarding, Inc. and 56 other firms filed multiple protests against MTMC. The protesters made various allegations against MTMC's small business set-aside of a pilot program that reengineered the DOD's program for personal property shipping and storage. *Id.* at *2. The GAO sustained the protests. *Id. See generally* Aalco Forwarding Inc., B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75.

480. *Aalco Forwarding*, 1999 U.S. Comp. Gen. LEXIS 134, at *4. The protesters' attorneys sought reimbursement from MTMC for $52,923.28 for the costs of filing and pursuing the protests. Additionally, the protesters requested attorneys' fees of $51,787.14 and $1136.14 in attorneys' out-of-pocket expenses that included copies, postage, courier service, and faxes. *Id.* Because the GAO did not sustain all the protest allegations, the attorneys allocated the amount of their fees to the sustained protest issue. *Id.* at *5. The attorneys, however, did not allocate the claimed out-of-pocket expenses to the sustained protest issue. *Id.* In their claim, the attorneys identified: (1) the relevant pages from each submission (protest letters and comments), (2) the calculation and the resulting percentage of each submission devoted to the sustained protest issue, and (3) the application of the percentage to the total attorneys' fees incurred during each submission. *Id.* The protesters filed no other supporting information. *Id*.

481. *Id.* Specifically, the agency requested a detailed breakdown of the attorneys' hours, copies of billing statements, and receipts for out-of-pocket expenses. *Id.*

482. *Id.* The agency made its request on 18 August 1998. The MTMC denied the cost claim on 23 November 1998, noting that the protesters' attorneys did not respond to its request for additional substantiation. *Id.*

483. *Id.* In addition, the protesters' attorneys alleged that they were waiting for the GAO's decision of their reconsideration requests filed on other issues contained in the original protests. *Id.* The GAO held that this purported reliance on the protesters' then-pending reconsideration request did not permit their failure to respond to the agency's request for additional support of their claim. *Id.* at *4.

484. *Id.* at *2. The attorneys included a breakdown of their legal fees, copies of bills for legal services, and receipts for out-of-pocket expenses. *Id.*

allow the agency to assess adequately the reasonableness of the claim.[485] The GAO affirmed its general rule that a protester must file its claim for reimbursement within sixty days after receipt of the GAO's recommendation that the agency pay the protester its costs.[486] If a protester fails to file an adequately supported initial claim within the sixty days allowed, it forfeits its right to recover costs.[487] The GAO held that in light of their failure to file a legally sufficient claim within the time required, the protesters' attorneys forfeited their right to recover their costs.[488]

COFC: The Second Year

The COFC had a busy second year under its new bid protest jurisdiction.[489] Jurisdiction, standing to protest and intervene, protective orders and protected material release, and sanctions were just a few of the issues the court reviewed this past year. As the court rendered its decisions, a new voice was heard in the bid protest arena.

You're Not Invited!

In 1998, Judge Diane Weinstein issued an opinion that caused government contractors to sit back and take notice. In *Advanced Data Concepts v. United States*, [490] Judge Weinstein precluded an awardee from intervening in a bid protest action filed before the COFC. In a more recent case, Judge Weinstein elaborated on her position and the awardee's standing to intervene in a bid protest before the court.

In *Anderson Columbia Environmental, Inc. v. United States*,[491] the court again denied an awardee's Rule 24 motion for intervention. The court held that the awardee could not satisfy the requirements for "mandatory" intervention found at Rule 24(a). In turn, the awardee requested permission to participate in the proceedings based upon Rule 24(b)'s permissive intervention provision.[492] Judge Weinstein denied the awardee's motion. The court held that the awardee did not identify a claim or defense in common with the existing parties because it was not "contesting the award on grounds claimed by plaintiff and the government's defense may or may not merge with the [the awardee's]."[493]

While not all of COFC has adopted Judge Weinstein's theory on Rule 24 intervention, it does present an interesting quandary for both the COFC and contract awardees. It appears that the ADRA's language does not extend the COFC's jurisdiction to disputes between private parties. If the COFC adopts Judge Weinstein's interpretation of the court's jurisdiction and Rule 24, it would preclude any awardee from joining in a bid protest, except as an amicus curiae.[494] If an awardee participates in a bid protest as an amicus curiae, however, the awardee would not be bound by the court's decision and would have to file a separate action if the court found in favor of the protester.[495] Until the CAFC speaks on this subject, awardees will find that their abil-

485. *Id.* at *8. The GAO stated that at a minimum, cost reimbursement claims must identify the amount claimed for each expense, the purpose for which that expense was incurred, and how the expense relates to the protest. *Id.* The GAO noted that the protesters' submission was not a complete, detailed breakdown of incurred expenses. Simply, the claim was an amount based on the total number of attorney hours the protesters' attorneys had allocated to the sustained issue, plus some listed out-of-pocket expenses. *Id.* The GAO stated that the claim lacked such essential information as an itemized accounting of the listed expenses, copies of billing statements, copies of receipts, and an allocation of the claimed out-of-pocket expenses to the sustained protest issue. *Id.*

486. *Id.* at *2. The 60-day timeframe was designed specifically to avoid piecemeal presentation of claims and to prevent unwarranted delays in resolving such claims. *Id.* at 3.

487. *Id.* at *9. Furthermore, the GAO stated that the protester forfeited reimbursement in this situation even if the protester and the agency continued to negotiate after the 60-day period expired. *Id.*

488. *Id.* The GAO found that by failing to respond to the agency's reasonable request for additional supporting information until after the MTMC denied its claim, the protesters contributed significantly to the failure to reach an agreement with the agency. Therefore, GAO found that the protesters did not pursue this matter diligently. A prerequisite to those who wish to avail themselves of a remedy from the GAO. *Id.* at *10.

489. The Administrative Disputes Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3874 (ADRA), amended the Tucker Act and granted concurrent jurisdiction over pre-award and post-award bid protests to both the COFC and the U.S. District Courts.

490. No. 98-495C, 1998 U.S. Claims LEXIS 326 (Jun. 18, 1998). In *Advanced Data Concepts,* Judge Weinstein denied an awardee the opportunity to intervene under the Rule 24 of the Rules of the Court of Federal Claims (RCFC). The awardee filed a motion with the court requesting permission to intervene on behalf of the agency. Judge Weinstein opined that the awardee was not entitled to intervention as a matter of right because the awardee was not an "interested party" over which COFC had jurisdiction under 28 U.S.C.A. § 1491(b). The awardee was not objecting to a solicitation, a proposed award, or the award of a contract, as a result, Judge Weinstein held that the court did not have jurisdiction over the awardee under the ADRA amendments to the Tucker Act. *Id*. at *3.

491. 42 Fed. Cl. 880 (1999).

492. *Id*. at 882. Rule 24 allows parties to intervene in COFC proceedings on both mandatory and permissive grounds. Rule 24(a) sets out only two circumstances when intervention is required: (1) when a U.S. statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the disposition of the action may impair or impede the applicant's ability to protect that interest. Rule 24(a), RCFC.

493. *Anderson Columbia Envtl.*, 42 Fed. Cl. at 883. Judge Weinstein went on to express concern that should the court allow the awardee to intervene, such intervention may prolong the case by possibly interfering with settlement discussions between the protester and the government. *Id.*

ity to intervene may depend on which judge at the COFC hears the case.

When Protected Information Isn't So Protected

In a decision that sparked great controversy and concern with those that do business with the government, Senior Judge Kenneth Harkins ordered that the parties make available to the public documents that were filed previously under seal pursuant to a protective order. In *Modern Technologies Corp. v. United States*,[496] Judge Harkins stated that the proprietary and source-selection information had "minimal current value."

The court found itself presented with the issue of releasing protected information after the sixty-day appeal period expired on a final judgment in a bid protest filed by Modern Technologies Corp (MTC).[497] Because the COFC is a federal court of record, its decisions are open to public inspection.[498] The presumption that the court's documents are available to the public is contrary to the court's protective order that provides that the protected information's confidentiality "shall be maintained in perpetuity."[499]

Upon the court's request to designate pleadings and documentary information that the parties would waive as to confidentiality, each of the parties to the protest declined to waive protection provided by the protective order.[500] The parties cited as their reasons for not waiving protection that: (1) the protected information was filed under seal by the court in reliance upon the court's order requiring confidentiality in perpetuity, (2) the Trade Secrets Act,[501] (3) the Procurement Integrity Act (PIA),[502] (4) the FAR's procurement integrity provisions,[503] and (5) the GAO's protective order.[504]

In discussing each of the parties' reasons to prevent release, the court determined that the crucial issue was the public's right to access to case files. The court held that the essential consideration in determining whether to release the protected material was the stage of litigation when such a decision is made.[505] The court found that because the procurement in question was concluded and the present litigation was terminated, "[t]he proprietary information and source selection sensitive information that became part of the [administrative record] and the [court] case have minimal current value."[506] The court found that there was little reason to keep this information from the public's view and ordered that all documents and other docketed materials were to be released for public availability. In fact, the court held that the public's awareness of the procurement would "[a]ssure that agency conduct implements full and open competition objectives and oversight compliance with statutory and regulatory requirements."[507]

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494. Amicus curiae, or "friend of the court," is defined as a person who is not a party to a lawsuit but who petitions the court to file a brief in the action because of a strong interest in the subject matter. BLACK'S LAW DICTIONARY 32 (Pocket ed. 1996).

495. If the protester prevailed on the merits of its complaint, the court could order the government to terminate the awardee's contract, re-evaluate proposals, or even cancel the current solicitation and resolicit. Clearly, such a decision would have a direct impact on the awardee's interest, but the awardee could not dispute the court's decision (i.e., appeal to the CAFC) other than by filing a separate complaint before the COFC. Additionally, an amicus curiae cannot engage, as a matter of right, in other aspects of the bid protest such as discovery and protective order proceedings.

496. 44 Fed. Cl. 319 (1998). The original procurement involved the award of five contracts to different contractors and involved multi-functional tasks. During the contracts' three-year duration, the contractors were to compete on subsequent task orders that would result in new and separate contracts. *Id.* at 326.

497. *Id*. at 320. MTC filed its original bid protest before the GAO, which rendered its decision on 4 March 1998. MTC subsequently filed a post-award claim before the COFC on 2 April 1998. The COFC filed its memorandum of decision under seal on 24 June 1998; MTC moved for reconsideration on 2 July 1998. The COFC filed its judgment dismissing the complaint on 2 July 1998. No appeal followed the 2 July 1998 final judgment. *Id.*

498. *Id. See* 28 U.S.C.A. §§ 171, 174 (West 1999).

499. *Modern Techs. Corp.*, 44 Fed. Cl. at 320. Likewise, the COFC's provision for protective orders, found in the court's General Order 38, provides specifically for information provided to the court and the parties under a protective order to remain confidential in perpetuity. *Id.* at 321. *General Order 38*, COFC, May 1998, *available at* <http://www.law.gwu.edu/fedcl/rules.htm>.

500. *Modern Techs. Corp.*, 44 Fed. Cl. at 320. All the parties to the original protest requested that their proposals, agency evaluation documents of their proposals, and all other documents that analyzed the content of the proposals, remain protected. *Id.*

501. 18 U.S.C.A. § 1905 (West 1999).

502. 41 U.S.C.A. § 423 (West 1999).

503. FAR, *supra* note 17, at 3.104.

504. *Modern Techs. Corp.*, 44 Fed. Cl. at 320-21. In MTC's original protest before the GAO, the GAO issued a protective order for the entire administrative record. *Id.* at 325. The GAO granted limited leave to release the protected information to the federal court. *Id*.

505. *Id.* at 326.

506. *Id.*

It's Not Nice to Fool with COFC!

In an unusual decision, the COFC sanctioned a protester, finding that it "effectively misled" the court, the government, and the awardee/intervenor. The court imposed sanctions under Rule 11 of the Rules of the Court of Federal Claims (RCFC) against the protester, Miller-Holzwarth, Inc. and its attorneys.[508] Rule 11 calls for mandatory sanctions if the court determines that a claimant has brought a claim in bad faith.

In *Miller Holzwarth, Inc.*,[509] Optex Systems, Inc., the intervenor in a post-award bid protest filed by Miller-Holzwarth (MH), moved for sanctions against MH.[510] Optex claimed that MH's president knowingly obtained source selection information from the Army's contract specialist in violation of the PIA.[511] Optex argued that MH's failure to disclose that it possessed source selection information constituted a bad faith abuse of the judicial system because MH misled the court, the government, and Optex throughout the litigation. Optex argued that had MH disclosed this information at the start of the protest, either the government or Optex would have moved to dismiss the protest based upon MH's "unclean hands."[512] MH argued that the information it received did not fit squarely within the statutory definition of "source selection information"; thus, no basis existed for imposing Rule 11 sanctions.[513]

The court discussed the primary purpose of Rule 11, which is to discourage baseless filings and "streamline the administration and procedure of the federal courts."[514] The court was unconvinced by MH's contention that the information was not source selection information. The court held that a reasonable contractor with experience similar to that of MH's president would have concluded that an unqualified instruction given to an offeror to alter its pricing scheme was source selection information.[515] The court found that MH verified its complaint before the court and provided testimony that included only those facts necessary to litigate a claim that it knew to have improper circumstances surrounding it.[516] The court sanctioned

507. *Id.*

508. R. Ct. Fed. Cl. 11. The pertinent text of Rule 11 states:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id. Rule 11 of the RCFC differs from Rule 11 of the Federal Rules of Civil Procedure because the latter provides for the discretionary imposition of sanctions. Fed. R. Civ. P. 11.

509. Miller-Holzwarth, Inc. v. United States and Optex Sys., Inc., 44 Fed. Cl. 156 (1999).

510. *Id.* at 157. The court denied the original post award bid protest filed by MH in which MH challenged the Army's contract award to Optex for periscopes used on Bradley Fighting Vehicles. *Id.*

511. *Id.* at 159. The PIA precludes a person from filing a protest against the award or proposed award of a contract alleging that source selection information was obtained improperly unless that person reported to the agency involved the improperly obtained information. 41 U.S.C.A. § 423(g) (West 1999). MH's president admitted in testimony that the Army's contract specialist informed him of source selection information and that he relied on the information when he changed the prices in MH's BAFO. Specifically, the contract specialist told MH's president after a pre-award meeting of all offerors that "there was no need to change [MH's] proposed prices for the Basic CLINs [contract line time numbers]." *Miller-Holzwarth, Inc.*, 44 Fed. Cl. at 159. Furthermore, in depositions conducted during the course of litigation, MH's president stated that the contract specialist informed him that MH should reduce its Option CLINs by 50%. *Id.* Optex alleged that MH's president did not report to the Army that he possessed source selection information given to him by the agency's contract specialist. *Id.*

512. *Id.* at 160. Optex suggested that MH's conduct in obtaining source selection information, failing to disclose it, and relying on it in changing its BAFO, amounted to "unsuccessful cheating." *Id.* MH filed its original protest in this matter based upon the Army's contract award to Optex. Based upon information gathered during the litigation, MH asserted that it relied upon the contract specialist's statement to MH's president that it should not change its Basic CLINs in it BAFO but should lower its Option CLINs by 50%. *Id.* MH alleged that had it not been given this information, it would have lowered its Basic CLINs, and its total BAFO price would have been lower than that of Optex. *Id.* MH's president contended that such remarks constituted "unfair and improper preferential treatment in favor of [Optex]." *Id.*

513. *Id.* at 164. MH argued that the definitions found in the PIA included such items as bid prices, proposed costs or prices, source selection plans, technical evaluation plans and evaluations of proposals, competitive range determinations, rankings of bidders/offerors, and other reports and evaluations of source selection personnel. *Id.* MH asserted that the information provided by the contract specialist did not fall into any of the statutorily defined categories. In fact, MH contended, the information did not reflect the "reality of the procurement" and was false information. *Id.*

514. *Id.* at 163. The court stated that Rule 11 exists to "deter" groundless pleadings. *Id.*

515. *Id.* at 164-65. The court discussed that even more revealing was the way in which the contract specialist conveyed the information, which occurred after the pre-award meeting and outside the view of other offerors. *Id.* at 165. Additionally, the court found that MH was less than candid with its eventual disclosure because it did not reveal the contracting specialist's statement in its entirety. At first, MH disclosed only that the contract specialist told its president not to alter its Basic CLINs. It was not until later in the litigation that MH's president testified that the statement included instructions for MH to lower its Option CLINs by 50%. *Id.*

516. *Id.* at 166.

both MH and its counsel, stating that this was the exact conduct envisioned by Rule 11.[517]

CONTRACT PERFORMANCE

Contract Interpretation

The CAFC Rules on Admissibility of Trade Usage

In March 1999, the CAFC reversed the ASBCA's decision in *Metric Constructors, Inc. v. National Aeronautics and Space Administration*.[518] In 1991, the National Aeronautics and Space Administration (NASA) awarded a $56 million contract to Metric Constructors, Inc. to build the Space Station Processing Facility at the Kennedy Space Center in Florida.[519] The contract specification called for the installation of approximately 13,000 light bulbs,[520] and stated that "new lamps shall be installed immediately prior to completion of the project unless construction conditions indicate otherwise."[521] Metric interpreted this provision to require only the replacement of lamps that were defective, burned out, or broken immediately before project completion. By contrast, NASA argued that the contract required Metric to replace all the lamps in the facility, a process which the industry refers to as "relamping." Metric insisted that removing and replacing working lamps was wasteful and unnecessary. In response, the contracting officer issued a unilateral modification deleting the contract provision that required Metric to install new lamps before it completed the project. The contracting officer then issued a second unilateral modification that reduced the contract price by $132,000 after the parties failed to reach an agreement regarding an equitable adjustment.

Metric filed a claim, which the contracting officer denied. Metric then appealed the contracting officer's final decision to the ASBCA. The board denied Metric's appeal and ruled in NASA's favor. The board held that the contract required Metric to relamp the facility.[522] Metric next appealed to the CAFC.

On appeal, Metric again relied on industry trade practice and custom,[523] arguing that the contract required it only to replace broken or defective lamps immediately before project completion. In addition, the contractor alleged that: (1) the board found that relamping is not usually required on new construction projects, (2) NASA did not require relamping on a different contract that contained identical lamping specifications, (3) NASA's cost estimate did not include relamping the entire facility, and (4) the majority of the lamps for the project had a life of six years and eight months.

The CAFC concluded that the courts and boards must look beyond the face of a disputed contract term or provision and to the context and intentions of the parties.[524] This does not mean

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517. *Id.* at 168. The court held that by pursuing the claim with such a suspect purpose, MH, in effect, misled the court, the government, and the intervenor. *Id.* Furthermore, the court found that MH's actions abused the judicial system and prolonged the litigation. *Id.* The court sanctioned MH's counsel under Rule 11 also. The court found that MH's counsel knew the claim to be misleading, both factually and legally. Counsel, however, signed and filed a verified complaint before the court, conducted discovery to include the scope of the facts that its client was concealing, and allowed the litigation to continue under the misleading impression that its client had disclosed all the operative facts concerning the conversation between MH's president and the contract specialist when, in reality, all such facts had not been disclosed. *Id.* at 169. The law firm representing MH has appealed the sanctions to the CAFC. *Procurement Integrity: COFC Sanctions Protester's Counsel, Finds Protest Was Brought for Improper Purpose*, Fed. Cont. Daily (BNA) (May 21, 1999), *available in* LEXIS News Library, BNAFCD file.

518. 169 F.3d 747 (Fed. Cir. 1999).

519. *Id.* at 748. Metric completed the Space Station Processing Facility on 15 February 1999. The Space Station Processing Facility consisted "of approximately 500,000 square feet and contained offices, computer and communication facilities, clean rooms, bays for processing space station payloads, and a parking lot." *Id.*

520. *Id.* The common name used for light bulbs in the industry is "lamps." *Id.*

521. *Id.* at 749. The contract called for the installation of three different types of light bulbs. Each section required the contractor to install new bulbs immediately before project completion, however, wording differed slightly from section to section. *Id.*

522. *See* Metric Constructors, Inc., ASBCA No. 48852, 98-1 BCA ¶ 29,384.

523. *Id.* at 751. The primary issue in this case dealt with the role of trade practice and custom in contract interpretation. Traditionally, there are two lines of cases that deal with trade practice and custom. One line of cases states that trade practice and custom may be used to resolve an ambiguous term or provision, but not to contradict an unambiguous term. *See, e.g.*, R.B. Wright Constr. Co. v. United States, 919 F.2d 1569 (Fed. Cir. 1990). The second line of cases holds that courts may use evidence of trade practice and custom to show that a clear and unambiguous term has a meaning different from its ordinary meaning. *See, e.g.*, Gholson, Byars, and Holmes Constr. Co. v. United States, 351 F.2d 987 (Ct. Cl. 1965). Relying on *Western States Constr. Co. v. United States*, 26 Cl. Ct. 818 (1992), the CAFC found that these two lines of cases, while seemingly divergent, are consistent with contract interpretation doctrines in practice. *Metric Constructors*, 169 F.3d at 751.

524. *Id.* at 752. The CAFC stated that:

> Excluding trade practice and custom evidence when the contract terms are clear or unambiguous on its face ignores the reality of the context in which the parties contracted. That context may well reveal that the terms of the contract are not, and never were clear on their face. On the other hand, that context may well reveal that the contract terms are, and have consistently been unambiguous.

Id.

that a party may use trade usage to create an ambiguity where none exists; however, a party can introduce trade usage to clarify or illuminate the reasonableness of a party's interpretation. Ruling for Metric, the CAFC concluded that the contractor relied reasonably on the trade practice and custom to show that the specifications were susceptible to different interpretations.[525] Because the requirement to replace lamps was ambiguous, the CAFC opined that trade usage did not require Metric to replace all the lamps in the facility.[526]

The COFC Defines "Cost"

In *Goldsmith v. United States*,[527] the U.S. Postal Service leased a building from the Goldsmiths to use as a post office. During the lease period, the City of Berkeley, California, ordered the Goldsmiths to conduct seismic retrofit work on the building. The Postal Service promised to reimburse the Goldsmiths for the cost of the seismic work upon completion. Relying on this promise, the Goldsmiths hired a contractor to perform the work. The contractor applied for a city permit and paid the fee; however, the City of Berkeley refused to issue the permit unless the contractor complied with the city's handicapped-accessibility requirements. Consequently, the parties amended the lease to provide that the Postal Service would assume jurisdiction over the project, the Goldsmiths would not apply for a city permit, and the Postal Service would reimburse the Goldsmiths for the cost of the seismic retrofit work. The amended lease stated, in part, that: "Upon 100% completion of the seismic work according to the plans and specifications and inspection and acceptance of the seismic work by the Postal Service, the Postal Service will reimburse [plaintiffs] for the cost of the seismic work."[528]

When the Goldsmiths completed the seismic work, the Postal Service reimbursed the Goldsmiths for all costs associated with the work except for the cost of the original permit fee and their legal fees.[529] The Postal Service contended that the amended lease only provided for the reimbursement of "costs of the seismic work" and argued that "fees" are not "costs" and, therefore, are not reimbursable. To support its refusal, the Postal Service relied on *Black's Law Dictionary*, which defined the word "cost" as "recovery of expenses by a prevailing party to litigation" and the word "fee" as a "charge fixed by law for services of public officers or for use of a privilege under control of government."[530]

The Goldsmiths disputed how the Postal Service defined cost. The Goldsmiths argued that none of the actual costs incurred would be reimbursable under the Postal Service's definition because there was no litigation. Instead, the Goldsmiths applied a layperson's definition of cost to argue that the permit and legal fees fell within the amended provision and were reimbursable.

The COFC rejected the Postal Service's arguments. The court reiterated the first rule of contract interpretation: read the contract as a whole, giving reasonable meaning to all its terms. The court found that adopting the Postal Service's interpretation would void the entire reimbursement provision. The court concluded that the parties did not intend this result when they executed the lease amendment allowing for the reimbursement.[531]

Contract Changes

Nonconformity with Design Specifications Results in Reduction in Contract Price

In 1987, the Army awarded a fixed-price contract to Donat Gerg Haustechnik to install an Energy Monitoring and Control System (EMCS) in Katterbach, Germany.[532] Gerg subcontracted the EMCS installation project to Honeywell Regelsysteme GmbH. While installing the EMCS, Honeywell encountered configuration problems and deviated from the contract specifications and drawings without the Army's consent. This deviation resulted in a nonconforming EMCS,[533] and the Army reduced the contract price for nonconformance with the contract specifications and drawings. Gerg challenged the

525. *Id.* at 753.

526. *Id.* at 752-53.

527. 42 Fed. Cl. 664 (1999).

528. *Id.* at 666.

529. *Id.* The seismic retrofit contractor paid the permit fee to the city. The city refused to refund the cost of the permit fee, after refusing to issue the permit without proper handicapped-accessibility to the work site. The Goldsmiths incurred additional legal fees to ensure the seismic retrofit work complied with the City of Berkeley's requirements. *Id*.

530. *Id.* at 667-68. *See* BLACK'S LAW DICTIONARY 312, 553 (5th ed. 1979).

531. *Goldsmith*, 42 Fed. Cl. at 669-70. The court found both the initial permit fee and the legal fees reasonable because the Goldsmiths incurred both fees in the course of completing the seismic retrofit work. *Id*.

532. Donat Gerg Haustechnik v. Caldera, No. 98-1210, 1999 U.S. App. LEXIS 9188 (Cl. Ct. May 13, 1999). The EMCS monitored and controlled the heat transfer for 115 buildings at Katterbach. *Id*. at *2.

Army's reduction in contract price to the ASBCA.[534] After the board ruled in the Army's favor, Gerg appealed to the COFC.

Gerg advanced three theories on appeal. First, Gerg argued that the relevant contract provisions contained performance, not design specifications, because the provisions lacked the necessary detail required for design specifications. Under this theory, Gerg asserted that the performance specifications allowed Honeywell to use its "ingenuity" to satisfy the system requirements. Second, Gerg asserted that the Army approved Honeywell's reconfiguration based on imputed knowledge.[535] Third, Gerg argued that the design specifications were fatally defective and, therefore, relieved Gerg of all liability. The Army disagreed and contended that Gerg delivered a nonconforming EMCS that cost more to use and was less convenient than the system for which the Army had contracted.

The court disagreed and ruled for the Army. The court concluded that, although the contractor had some discretion to reconfigure the EMCS, the contract contained explicit design specifications with which the contractor failed to comply. The court also noted that Gerg failed to prove that the design specifications were fatally defective. The court reasoned that some evidence of a defect in a design specification does not give the contractor the freedom to deviate from the contract specifications absent the Army's consent. Finally, the court dismissed Gerg's argument that the Army had constructive knowledge of Honeywell's deviation. The court found that the contract specifically restricted the contracting officer's ability to change the terms of the contract without a written change order. Therefore, the court held that Gerg was not entitled to the full contract price for work that did not conform to the contract requirements.[536]

Commercial Impracticability Requires More than a Showing of Mere Economic Hardship

In *McElroy Machine & Manufacturing Co.*[537] the Navy awarded a fixed-price contract to manufacture and deliver two 30,000 pound winches and two 150,000 pound winches for $489,540. McElroy alleged that it discovered numerous design deficiencies in the Navy's specifications after contract award; however, McElroy failed to notify the Navy of the alleged deficiencies. Instead, the contractor substituted its own specifications and proceeded with the production of the winches. Unfortunately, McElroy was unable to complete the final assembly because the modified winches exceeded the width and weight requirements in the contract. The Navy denied the contractor's request for a waiver of the width and weight requirements. Instead, the Navy accepted the contractor's engineering change proposals.

After McElroy completed the contract, it submitted a claim for $734,804 based on defective specifications. The contracting officer denied the claim. In May 1992, McElroy appealed to the ASBCA; however, the board dismissed the appeal without prejudice because the contractor failed to document the amount of the claim adequately.[538] Therefore, the submission did not constitute a claim under the CDA.[539] In March 1993, McElroy resubmitted its claim for $732,657. McElroy argued that it was entitled to the increased costs because the Navy's specifications were defective and impossible to perform.

Ruling for the Navy, the board concluded that McElroy could not recover because it assumed the risk of increased costs when it substituted its own specifications without notifying the Navy of the design defects.[540] In addition, the ASBCA rejected McElroy's commercial impracticability argument. McElroy

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533. *Id.* at *3. The contract required the contractor to configure the EMCS so that the system could be centrally controlled at two locations, locally at Katterbach and at a location approximately eight kilometers from Katterbach (Central Control Master Place). Honeywell's deviation resulted in the loss of central control of the EMCS from Katterbach, resulting in total control of the EMCS at the Central Control Master Place. *Id*.

534. *See* Donat Gerg Haustechnik, ASBCA Nos. 41197, 42001, 42821, 47456, 97-2 BCA ¶ 29,272.

535. *Gerg*, No. 98-1210, 1999 U.S. App. LEXIS 9188, at *3. Gerg argued that the Army's representative, Mr. Rudolph Gmelch, worked closely with Honeywell and had numerous discussions with it during the installation process. Therefore, Gerg argued that Mr. Gmelch knew or should have known that Honeywell intended to deviate from the contract drawings, and the court should impute his knowledge to the contracting officer. *Id*.

536. *Id.* at *8-*11.

537. ASBCA No. 46477, 99-1 BCA ¶ 30,185. The Navy drafted the winch specifications based on other Navy winches and discussions with commercial manufacturers and suppliers of commercial winches. The Navy verified the availability of commercial winches before finalizing the winch specifications. *Id*. at 149,347-48.

538. McElroy Mach. & Mfg., Co., Inc., ASBCA No. 39416, 92-3 BCA ¶ 25,107.

539. *See* 41 U.S.C.A. §§ 601-613 (West 1999).

540. *McElroy*, 99-1 BCA ¶ 30,185 at 149,356 The board stated:

> To receive an adjustment based upon a defective specification, a contractor must show that the specification was defective and that a defect in a specification caused it to incur additional costs. If additional costs were incurred only as the result of the contractor's attempt to perform in accordance with its substituted specifications rather than the government specifications, the contractor is not entitled to reimbursement.

Id. (citing Gulf & Western Precision Eng'g Co. v. United States, 543 F.2d 125 (1976); American Combustion, Inc., ASBCA No. 43712, 94-3 BCA ¶ 26,961).

argued that performance was impossible because a lack of commercially available parts caused it to incur costs for in-house design and fabrication.[541] The board stated that to assert commercial impracticability, McElroy must demonstrate actual impossibility or that the costs associated with the performance are "commercially senseless."[542] A showing of simple economic hardship is not enough.[543]

What's In a Specification?

In *Fru-Con Construction Corp. v. United States*,[544] the appellant sought to recover the cost of damages caused by overblasting on an USACE contract. The appellant, Fru-Con Construction Corp., argued that the USACE's specification of alternative methods of performance gave rise to an implied warranty that it could achieve the desired result by using either method.[545] Fru-Con argued that the USACE's concrete removal specifications and bid drawings outlined all the required elements of its blasting plan.[546] Therefore, it argued that the USACE used design specifications, which carry an implied warranty.

The theory of implied warranty of specifications generally arises in the context of a design specification, where the government provides a blueprint for a contractor to follow. In this case, however, the USACE asserted that its specifications were performance rather than design specifications. The USACE argued that the drawings and the blasting plan were nothing more than guidance; Fru-Con was still responsible for designing and submitting a detailed workable plan. The USACE moved for summary judgment, which the COFC granted.[547]

The court looked to *J.L. Simmons Co. v. United States*,[548] for the definition and the distinction between design specifications and performance specifications.[549] The court then concluded that only a defective design specification affords a contractor relief under the theory of implied warranty of specifications. A performance specification carries no warranty because the contractor has broader discretion.[550] The court found the USACE used performance specifications and Fru-Con retained complete discretion in the development of the blasting plan, subject only to the review and approval of the USACE.[551]

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541. *Id.*

542. *Id*. at 149,357-58. The contractor must show that the increased cost of performance is so much greater than anticipated that performance is commercially senseless. *See* ASBCA No. 38969, 91-3 BCA ¶ 24,241.

543. *McElroy*, 99-1 BCA ¶ 30,185 at 149,358.

544. 42 Fed. Cl. 94 (1998).

545. *Id.* at 95. The contract provided two alternative methods of concrete removal. Unfortunately, the redacted opinion does not specify the two methods. *Id.*

546. *Id*. The concrete removal specification required Fru-Con to submit a blasting plan for the USACE's approval. Section C-02075 of the concrete removal specification provided:

> Detailed Blasting Plan: A detailed blasting plan shall be submitted to the Contracting Officer for approval. The plan shall include, but not be limited to, the diameter, depth, and spacing of the drilled holes; the size and location of charges; the blasting sequence; method and location of handling, transporting, and storing explosives; monitoring plan and equipment; method for determining that all explosives have been expended and that the work site is clear before removal work resumes; and personnel who will be working with explosives. The plan shall consist of a narrative plus sketches which completely describe all blasting.

Id.

547. *Id.* at 99.

548. 412 F.2d 1360 (1969).

549. *Id.* at 1362. In *J.L. Simmons*, the court stated:

> "Design" specifications in a government contract are those in which the government sets forth in precise detail the materials to be employed and the manner in which the work is to be performed. The contractor is not privileged to deviate from these specifications. In contrast, "performance" specifications set forth an objective or standard to be achieved, and the contractor must exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection.

Id.

550. With a performance specification, the government does not provide a blueprint; rather the government provides information on what it would like to see when the contractor produces the final product. *See* Interwest Constr. v. Brown, 29 F.3d 611 (Fed. Cir. 1994).

551. *Fru-Con*, 42 Fed. Cl. at 98.

Housekeeping Services Are Beyond the Scope of Maintenance Services

In May 1996, the USACE awarded an IDIQ contract for maintenance services to BMAR and Associates, Inc. (BMAR).[552] Under the contract, BMAR performed preventive maintenance and equipment inventories at medical facilities at various locations around the world.[553] In 1997, the USACE modified the contract to add housekeeping and exterior grounds maintenance services. In April 1997, the USACE issued a task order to BMAR for housekeeping services[554] under the newly modified contract. In May 1997, Makro Janitorial Services, Inc. (Makro) filed a timely protest.[555] Makro alleged that the USACE violated the CICA by modifying the BMAR's preventive maintenance contract to exceed the scope of the original contract.

Makro argued that housekeeping is materially different from the preventive maintenance services. The USACE responded that the task order was proper because maintenance and housekeeping services involved the same type of work (for example, keeping the facilities functional). To resolve this issue, the GAO looked to the materiality test in *Neil R. Gross & Co.*,[556] and agreed with Makro's argument. The GAO concluded that the modification and the task order were beyond the scope of the original contract. The GAO found that potential offerors could not have reasonably anticipated the addition of housekeeping services because the original scope of work differed materially from the housekeeping services.[557]

Inspection, Acceptance and Warranty

It's Been a Long, Long Time–Three Years to be Exact!

How long can an agency take to determine that a contractor's work contains a latent defect? In the appeal of *Traylor Brothers, Inc. & S&M Constructors*,[558] the answer was loud and clear–not three years!

In 1974, the Washington Metropolitan Area Transit Authority (WMATA) awarded a contract to Traylor Brothers, Inc., to construct a section of the Washington Metrorail System. The contract work required Traylor to construct 16,300 square feet of floating slabs, including isolation pads.[559] The contract required the pads to pass a battery of tests before approval for use. The contract contained a clause stating that WMATA's acceptance was final and conclusive except for latent defects.[560]

Shortly after award, Traylor offered, and WMATA accepted, isolation pads made of a different material than that required by the contract.[561] In 1977, Traylor installed the floating slabs and isolation pads, and WMATA tested, approved, and accepted the work. Later that same year, WMATA took possession of all the completed work. The contracting officer authorized final payment to Traylor in 1980.[562] In 1981, WMATA's inspectors reported problems with the floating slabs.[563] A chemical analysis on the isolation pads showed the pads were defective. In September 1991, the contracting officer issued a final decision informing Traylor of the alleged deficiencies and finding it responsible for the costs associated with correcting them.[564]

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552. Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39.

553. *Id*. at 2. Under the preventive maintenance services contract, BMAR performed and supplied all plant, labor, materials, and equipment necessary for real property inventory, demand maintenance repairs, and surveys of medical facilities. *Id.*

554. *Id.* The modification defined the housekeeping services as all labor and materials to maintain the cleanliness of all medical facility spaces. The cleaning services included damp wiping and dusting; spot cleaning of surfaces; vacuuming; and cleaning plumbing fixtures, windows, beds, and linens. *Id.*

555. The GAO concluded that Makro filed a timely protest because it did not know of that the USACE intended to obtain the housekeeping services through BMAR's preventive maintenance contract. *Id*.

556. B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212. The overall materiality test applied by the GAO in *Gross* was "whether the modification is of a nature which potential offerors would reasonably have anticipated." *Id*. at 3. *See, e.g.*, AT&T Communications, Inc. v. Wiltel, 1 F.3d 1201 (Fed. Cir. 1993); MCI Telecomm., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90; CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342.

557. *Makro*, 99-2 CPD ¶ 39 at 5-6.

558. ENG BCA No. 5884, 99-1 BCA ¶ 30,136.

559. *Id* at 149,071. Floating slabs were part of the system designed to attenuate vibrations emanating from the operation of the rail cars beneath the ground surface. *Id.*

560. *Id.*

561. *Id.* The contract called for isolation pads made of rubber or fiberglass. Traylor offered pads made of polyurethane. *Id.*

562. *Id*. at 149,072. The contracting officer authorized final payment in July 1980.

563. *Id.* In October 1981, the inspectors reported that the slabs had settled between 1/2 and 2 1/2 inches. As a result, WMATA's general engineering consultant conducted a field investigation. The consultant reported that the isolation pads under the affected floating slabs "showed several wrinkles . . . indicating excessive compression." *Id*. Later that same month, WMATA completed an initial floating slab system survey. The survey concluded that all the floating slabs throughout the metrorail system had settled, some to the point that immediate attention was needed to correct the compression. *Id*.

On appeal to the Engineering Board of Contract Appeals (ENGBCA), Traylor argued that a nine-year delay between WMATA's discovery of the defect and its notification to Traylor of that defect entitled Traylor to summary disposition as a matter of law. Alternatively, Traylor asserted that it was entitled to prevail even if the board determined that the delay was a shorter period, for example, three years. In response, WMATA maintained that: (1) it notified Traylor's supplier of the problem with the isolation pads in January 1983, (2) Traylor learned of the defect through negotiations on another contract in September 1983, and (3) WMATA only learned of the defect in 1988.[565]

The board rejected WMATA's argument, finding it unreasonable that WMATA claimed that it notified Traylor of the defect five years *before* it learned of it.[566] After that bit of levity, the board found that WMATA discovered the defect in 1988, not 1983, and delayed providing notice to Traylor for three years.[567]

The board stated that the question of how long an agency has between discovering a latent defect and notifying the contractor is a question of law.[568] The board found unrealistic WMATA's claim that it was unable to notify Traylor until it completed its investigations and "had good evidence that the pads were latently defective."[569] The fact that the buyer has discovered a defect, the board stated, was sufficient to trigger notice of the defect to the seller without further investigating how and why the product failed.[570] The board held that the early and continuing collapse of the slabs gave WMATA a basis to provide timely notice to Traylor. The board concluded that the three years that WMATA took to notify Traylor of the defect was unreasonable and WMATA's earlier acceptance of the work was final and conclusive.[571]

Pricing of Adjustments

Unabsorbed Overhead: CAFC Refines the Meaning of "Replacement Work"

The CAFC continued its annual attempt to refine the *Eichleay*[572] formula for a contractor's recovery of unabsorbed overhead in *Melka Marine, Inc. v. United States*.[573] The Navy awarded Melka Marine, Inc. a contract that included dredging a portion of the Potomac River near Washington, D.C., constructing a breakwater, and repairing other structures.[574] The contract required the Navy to obtain a permit prior to the start of the dredging and breakwater work.[575] On 4 November 1994, the Navy notified Melka that it had not yet obtained the permit, but that the contractor could start repair work.[576] On 29 November 1994, the Navy suspended all dredging and breakwater work "for an indefinite period" because of the delay in obtaining the permit.[577] Melka completed the repair work substantially by 4 January 1995. On 2 February 1995, the Navy advised Melka that dredging and breakwater work could start after 15 October 1995.[578]

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564. *Id.* The WMATA did not give Traylor the opportunity to inspect, remedy, or restore any damaged work that resulted from the defects. *Id.*

565. *Id.* at 149,073.

566. *Id.* The board held that even if WMATA notified Traylor's supplier, this did not constitute notice to Traylor. *Id.* Additionally, the board found that WMATA's assertion that it made Traylor aware of the defect during negotiations on a contract in 1983 was of no effect. *Id.* The WMATA's argument was based upon a declaration by one of its employees who stated that in close out discussions with Traylor in 1983, Traylor was "made aware of WMATA's overall isolation pad problem . . . ." *Id.* The board ruled that it was "improbable conjecture" on WMATA's part that Traylor knew of the defect from this conversation, especially because WMATA maintained that it did not discover the defect until 1988. *Id.*

567. *Id.*

568. *Id.* The board held also that "it is plain that there are cases where reasonable minds cannot differ respecting certain periods of time." *Id.*

569. *Id.* The board announced that WMATA offered no authority for its argument. The board stated further that there was no evidence of an ordinary commercial practice that required WMATA to investigate the defect in depth. *Id.*

570. *Id.*

571. *Id.* at 149,074.

572. *See* Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on reconsideration*, 61-1 BCA ¶ 2894. The *Eichleay* formula is the only means approved in Federal Circuit case law for calculating recovery for unabsorbed overhead. *See* Interstate Gen. Gov't. Contractors, Inc. v. West, 12 F.3d 1053, 1058 (Fed. Cir. 1993).

573. 187 F.3d 1370 (Fed. Cir.), *reh'g denied and suggestion for reh'g en banc declined* (7 Oct. 1999). Other recent Federal Circuit decisions on proper application of the *Eichleay* formula include *West* v. *All State Boiler, Inc*., 146 F.3d 1368 (Fed. Cir. 1998), *Satellite Electric Co*. v. *Dalton*, 105 F.3d 1418 (Fed. Cir. 1997), *Altmayer* v. *Johnson*, 79 F.3d 1129 (Fed. Cir. 1996), and *Mech-Con Corp*. v. *West*, 61 F.3d 883 (Fed. Cir. 1995).

574. *Melka Marine*, 187 F.3d at 1373.

575. *Id.*

576. *Id.* On 16 November 1994, Melka notified the Navy that the delayed permit would delay project completion, and that it would re-sequence work to avoid inactivity. *Id.*

Melka submitted a claim for its increased costs associated with the suspension of work for the period of 16 November 1994 to 30 March 1995. The contracting officer denied the contractor's claim, including those portions that related to unabsorbed overhead costs. Melka appealed the contracting officer's final decision to the COFC. The court considered whether Melka was entitled to receive unabsorbed overhead expenses under the *Eichleay* formula.[579] The court examined Melka's claim in relation to four time periods[580] and determined for each that: (1) the government had not imposed a delay,[581] (2) Melka was not on standby because it was working on other portions of the contract,[582] (3) Melka was able to bid on and take on other work while on standby,[583] and (4) Melka was not on standby because the delay period was certain in duration.[584]

The CAFC affirmed the trial court's decision in part. The appellate court held that when there was no government-imposed delay, when the contractor was working on the contract, or when the contractor knew with certainty of the delay's duration, then the contractor was not on standby.[585] The CAFC vacated and remanded, however, the trial court's decision regarding the period where the contractor was on standby of indefinite duration.[586]

The court held that the *Eichleay* damages analysis does not focus upon a contractor's ability to take on *any* other work. Instead, a key to *Eichleay* damages is whether the contractor was able to take on *replacement* work during the indefinite standby period.[587] Replacement work must be similar in size and length to the delayed government project and must occur during the same period.[588] Further, the acceleration of other projects already planned constitutes additional work in the ordinary course of a contractor's business, and not replacement work.[589]

The *Melka* decision places a "heavy burden . . . on the government once a contractor has established its prima facie case of entitlement to *Eichleay* damages."[590] In fact, the court has made replacement work something akin to "manna from heaven"[591] which falls unexpectedly from the sky in the exact

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577. *Id.* Based upon the Navy's instructions, Melka demobilized its dredging and breakwater equipment. *Id.* at 1374. Melka later used the equipment on two other projects that it had originally scheduled to perform after the Navy project. *Id.* "Melka also bid on other projects during this period which it did not receive, but that it would have been able to perform at some point had they been awarded the projects." *Id.*

578. *Id.* Melka agreed to perform the work at the original contract price and agreed to February 1996 as the revised completion date. The contractor completed all work by February 1996. *Id.*

579. Melka Marine, Inc. v. United States, 41 Fed. Cl. 122, 125 (1998). To recover unabsorbed overhead under the *Eichleay* formula, a contractor must establish (1) a government-imposed delay, (2) that the contractor was required to be on "standby" during the delay, and (3) while "standing by," the contractor was unable to take on additional work. *Id.* (citing Satellite Elec. Co. v. Dalton, 105 F.3d 1418, 1421 (Fed. Cir. 1997)). Once the contractor establishes a prima facie case that the contractor was required to standby and that the government-imposed delay was uncertain, then the burden shifts to the government to show that "the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay." *Id.* (citing Mech-Con Corp. v. West, 61 F.3d 883, 886 (Fed. Cir. 1995)).

580. *Melka Marine*, 41 Fed. Cl. at 125-27. The four time periods into which the court dissected Melka's claimed entitlement to unabsorbed overhead were: (1) 16-29 November 1994, (2) 29 November 1994–4 January 1995, (3) 4 January–2 February 1995, and (4) 2 February–30 March 1995. *Id.*

581. *Id.* at 125-26.

582. *Id.* at 126.

583. *Id.* at 126-27.

584. *Id.* at 127.

585. *Melka Marine*, 187 F.3d at 1375-76. "If work on the contract continues uninterrupted, albeit in a different order than originally planned, the contractor is not on standby." *Id.* at 1376. Further, a definitive delay precludes recovery "because 'standby' requires an uncertain delay period where the government can require the contractor to resume full-scale work at any time." *Id.*

586. *Id.* at 1377-78.

587. *Id.* at 1377. "[A]dditional work is not automatically considered replacement work which would preclude recovery under the Eichleay formula." *Id.* (citing *All-State*, 146 F.3d at 1377 n.2).

588. *Id.* at 1379. "[I]f the same amount of money is not contributed to the overhead costs in the same period by the replacement work, then the contractor should be able to obtain at least some Eichleay damages." *Id.*

589. *Id.*

590. *Id.* "We note that in very few cases where the contractor can demonstrate it was on standby during the suspension will the government be able to demonstrate that it was not impractical for the contractor to take on replacement work." *Id.* 1378 (quoting West v. All State Boiler, 146 F.3d. 1368, 1380 (Fed. Cir. 1995).

591. *Exodus* 16:4-17.

amount and at the exact time needed. Notwithstanding the shift in legal responsibility between the contract parties, the *Melka* decision does clarify further the *Eichleay* formula.[592]

Timely Completion by Prime Contractor Does Not Preclude Unabsorbed Overhead Claim by Subcontractor

In *E.R. Mitchell Construction*,[593] the CAFC held that the prime contractor's timely completion did not prohibit a subcontractor's claim for unabsorbed overhead. The Navy awarded Mitchell a contract for construction of a clothing issue building at Parris Island, South Carolina. Mitchell entered a subcontract with Clontz-Garrison Mechanical Contractors (CG) to perform the mechanical work required under the contract.[594] Mitchell and CG established an internal subcontract completion date.[595] During performance, CG notified Mitchell, and in turn the Navy, that certain specifications and drawings were defective. CG's performance was essentially on standby for a period of sixty days while the Navy made changes to the specifications and drawings. As a result of the changes, the Navy modified the contract and increased the price by the amount of the additional costs. Mitchell completed the contract a few weeks in advance of the completion date.

Mitchell submitted a claim on behalf of CG for the unabsorbed overhead that the subcontractor incurred during the subcontractor's sixty-day delay. The contracting officer denied the claim because Mitchell had not been delayed in the critical path of its contract with the Navy, and because Mitchell had been compensated fully for its additional costs by an earlier contract modification. Mitchell appealed the final decision to the ASBCA, which concluded as a matter of law that the unabsorbed overhead costs of a subcontractor cannot be recovered in a pass-through suit when the prime has completed its contract on time.[596]

The CAFC first considered, and rejected, the government's argument of sovereign immunity.[597] As to the merits of appellant's claim, the court rejected the argument that timely completion of a prime contract bars, as a matter of law, a subcontractor's otherwise satisfactory unabsorbed overhead claim. The court noted that the additional direct costs attributed to the change in drawings were in fact passed through from the subcontractor, and saw no reason why indirect costs should receive different treatment.[598] "[W]hen a prime contractor is permitted to sue on behalf of its subcontractor, the claim of the subcontractor merges into the claim of the prime contractor, because the prime contractor is liable to the subcontractor for the harm to the subcontractor caused by the government's delay."[599] Therefore, "[a]side from the privity considerations, which are inapplicable to this case, we see no reason to exclude [unabsorbed overhead] damages of a subcontractor simply because the prime contractor completed its contract on time."[600]

Costs Incurred on an Unrelated Contract Are a Recoverable Expense of an Equitable Adjustment

In *Clark Concrete Contractors, Inc. v. General Services Administration*,[601] the General Services Board of Contract Appeals (GSBCA) determined that overtime costs incurred by a contractor on an unrelated contract were recoverable expenses of an equitable adjustment. The GSA contracted with Clark[602] to construct the Washington Metropolitan Field Office of the Federal Bureau of Investigation (FBI). After contract award, the GSA redesigned the building to make it more capable of withstanding a bomb blast. These design changes caused

592. *Melka Marine*, 187 F.3d at 1380.

593. E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

594. CG's work included heating, ventilation, air conditioning, plumbing, steam, exterior sanitary sewer and water distribution. *Id.* at 1372.

595. The contracting officer later approved Mitchell's work schedule, to include all subcontractor deadlines. *Id.*

596. E.R. Mitchell Constr. Co., ASBCA No. 48745, 98-1 BCA ¶ 29,632. According to the ASBCA, because the delay had not affected the critical path of Mitchell's contract with the Navy, CG could not recover unabsorbed overhead damages through the prime contractor. *Id.* at 146, 837-38.

597. The court restated the general rule that the government consents to be sued only by parties with which it has privity of contract. *E.R. Mitchell Constr.*, 175 F.3d at 1370 (citing Erickson Air Crane Co. of Wash. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984)). A prime contractor, however, may sue the government on a subcontractor's behalf, in the nature of a pass-through suit, for the extra costs incurred by the subcontractor if the prime contractor is liable to the subcontractor for such costs. *Id.* at 1370 (citing Severin v. United States, 99 Ct. Cl. 435 (1943) (1944)). Absent such proof of prime contractor liability, the government retains its sovereign immunity from pass-through suits. *Id.* at 1370. The government may use the *Severin* doctrine as a defense, however, only when it raises and proves the issue at trial. *Id.* at 1371. When the government fails to raise its immunity defense at trial, the claims of the subcontractor are then treated as if they are the claims of the prime and any further concern about the absence of subcontractor privity with the government is extinguished. *Id.* The court here found no mention in the record before the ASBCA to suggest that the government raised its sovereign immunity defense. *Id.*

598. The court also noted that here, the subcontractor's performance schedule was not only known but approved by the Navy. *Id.* at 1373.

599. *Id.* at 1373-74.

600. *Id.* at 1374.

601. GSBCA No. 14340, 99-1 BCA ¶ 30,280.

a serious disruption of the construction project for Clark and its subcontractors.[603]

One affected subcontractor was M. Hill Enterprises, Inc.[604] Hill normally scheduled its work sequentially, so that one job began as another ended. Hill planned to start and finish the FBI job in a certain two-month period, then begin an unrelated project the following month. The FBI project delays pushed back Hill's work, so that Hill had to perform both jobs at the same time.[605] Consequently, Hill had its personnel work overtime hours at both jobs. Within Clark's claim to the GSA, Hill sought the overtime costs incurred on both the FBI contract as well as the second unrelated contract.

The FAR permits contractors to recover only certain costs for adjustment purposes.[606] To recover a cost, the contractor must show that the costs are reasonable,[607] allocable,[608] and allowable.[609] Here, the agency argued that the overtime costs incurred by Hill in working the unrelated project were not allocable because they "did not benefit the . . . GSA contract" for construction of the FBI building.[610] The GSBCA rejected the agency's argument, the FAR, and its own prior decisions,[611] on this matter. Instead, the board determined that all of Hill's overtime expenses were recoverable because they were all *equitable* and *attributable*[612] by-products of the agency's design changes. This decision, grounded much less in law than in equity, makes the future pricing of adjustments a less certain endeavor for both government agencies and contractors.

Proof, Like Truth, Is in the Eye of the Beholder

In *Deval Corp.*,[613] a divided ASBCA determined that a contractor's clear entitlement to an equitable adjustment did not diminish the contractor's burden of proving the amount of such an adjustment. In May 1991, the Navy contracted with Deval to overhaul armament-handling equipment.[614] In February and March 1993, the Navy terminated for convenience the work ordered under two specific line items, but continued work under the remainder of the contract. Deval then submitted requests for adjustments for the increased overhead resulting from the partial termination, asserting that its allocation of fixed indirect costs to the unterminated work had increased.[615] Although the partial termination only reduced the contractor's

602. The GSA actually awarded the contract to OMNI Contractors, Inc., which changed its corporate name to Clark Concrete Contractors, Inc., after contract award. *Id.* at 149,737. Since most of the matters raised in this case occurred before the name change, and for simplicity's sake, the GSBCA referred to the contractor as OMNI in its opinion. *Id.*

603. *Id.* at 149,737. Ultimately, the GSBCA determined that the blast design changes delayed contract completion by 185 days, and entitled Clark to an equitable adjustment of $6,207,605. *Id.* at 149,744-45, 149,776. It should be noted that neither the contractor nor the GSBCA attempted to segregate the costs of the delay from the costs of the design changes, thus resulting in the receipt of profit upon the entire equitable adjustment claim. *Id.* at 149,775.

604. *Id.* at 149,773.

605. *Id.* Hill was unable to hire additional personnel as a means of satisfying both obligations. "It was [also] reluctant to take on additional field personnel because it did not want to risk sacrificing quality by hiring individuals with uncertain skills." *Id.*

606. FAR, *supra* note 17, at 31.201-2(a).

607. *Id.* at 31.201-3.

608. *Id.* at 31.201-4.

609. *Id.* at 31.204.

610. *Clark Concrete*, 99-1 BCA ¶ 30,280 at 149,773.

611. *See* Sterling Fed. Sys., Inc. v. National Aeronautics and Space Admin., GSBCA No. 10000-C-REM (9835-P), 95-1 BCA ¶ 27,575 (holding that a cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received); Chambray Coatings Corp. v. General Servs. Admin., GSBCA No. 10700, 93-3 BCA ¶ 26,194 (denying a contractor's claimed indirect costs because the benefited direct costs were not substantiated).

612. *Clark Concrete*, 99-1 BCA ¶ 30,280 at 149,773. With a rationale more founded in tort than in public contract law, the GSBCA held:

> Hill had to pay its employees overtime wages to work on the [other] project because (and only because, as far as our record indicates) construction delays on the FBI project resulted in the firm's having to perform both jobs at the same time. Requiring Hill to absorb the costs would be unfair because the expenses were not incurred due to any fault of Hill's, and requiring the [other project] to pay for them would be inequitable because they were not incurred due to any fault of the [other project]. The costs are directly attributable to the delays on the FBI job.

Id.

613. ASBCA Nos. 47132, 17133, 99-1 BCA ¶ 30,182.

614. The contract had a base year and four options years. *Id.* at 149,323. The base year estimated price was in excess of $19 million, and the total estimated contract price for all five years was in excess of $48 million. *Id.* The contract lasted a total of two years, and the Navy exceeded the required minimums in both years. *Id.* at 149,324-25.

direct costs by approximately $190,000, Deval claimed a reallocation of indirect costs totaling more than $335,000. The contracting officer rejected the requested adjustments and subsequent claims because the contractor failed to provide adequate data to calculate the amount of the loss with sufficient certainty.

The ASBCA held that a contractor generally is entitled to an equitable adjustment on a proper showing of increased indirect costs associated with performing the unterminated work following a partial termination.[616] It is the contractor's burden, however, to demonstrate that the partial termination caused the cost of performing the remaining work to increase.[617] Deval failed to present sufficient data for the board to make a definitive calculation.[618] Given the numerous proof deficiencies, the majority saw the amount of damages as mere speculation. By contrast, given the reasonable certainty that injury did in fact occur, the dissent saw the amount of damages as a fair and reasonable approximation.

Equitable Adjustments: It's the Difference in Costs That Counts

In *B.R. Services, Inc*. (BRS),[619] the ASBCA denied a contractor's equitable adjustment claim, as it failed to represent the reasonable costs of performing the change in work. In June 1993, the State Department awarded BRS a contract to replace the roof of the U.S. Embassy in Nepal. After award, the contracting officer changed the contract work by requiring the contractor to install a polyvinyl chloride membrane sheet in place of the originally required aluminum flashing. BRS then submitted an equitable adjustment for the costs associated with the change order. In addition to lacking support for the claimed material and shipping costs, BRS's claim failed to reflect a credit for the reasonable costs of the materials originally specified. The contracting officer found the contractor's claim insufficient, but did make partial payment based upon the government's own estimates.

A contractor's entitlement to an equitable adjustment normally is quantified as "the difference between the reasonable costs of performing the work with and without the change."[620] The contractor bears the burden, however, of demonstrating the amount by which the change increased its cost of performance.[621] Here the contractor claim set forth, without support, only the costs associated with the change. By failing to quantify the reasonable difference in costs associated with the change, the board found that the government's estimates provided the most reliable basis for adjustment.

Value Engineering Change Proposals

This past year, the COFC held that a FAR clause purporting to exempt value engineering change proposals (VECP)[622] disputes from the CDA requirements is unenforceable.

In *Rig Masters, Inc. v. United States*,[623] the USACE awarded a contract to Rig Masters for inspection, maintenance and repair services. The contract included the FAR clause known as the Value Engineering Clause.[624] Rig Masters submitted a VECP to the USACE that demonstrated how revised operating procedures at one of the facilities could save electricity and labor costs. Although the contracting officer concluded that the

615. The contractor's requests for adjustments were separate and distinct from the termination for convenience claims upon which the parties reached agreement. *Id.* at 149,324.

616. *Id*. (citing Cal-Tron Sys., Inc., ASBCA Nos. 49279, 50371, 97-2 BCA ¶ 28,986; Wheeler Bros., Inc., ASBCA No. 20465, 79-1 BCA ¶ 13,642; Henry Spen & Co., ASBCA No. 20766, 77-2 BCA ¶ 12,784).

617. *Deval Corp*., 99-1 BCA ¶ 30,182 at 149,325. To determine whether a contractor suffers an increased allocation of its fixed indirect costs, it is necessary to quantify the reduced direct costs attributable to the partial termination, as well as the change in company-wide overhead rates resulting from the decrease in direct costs. *Id*.

618. Deval presented no evidence detailing what direct costs it incurred, when direct costs were incurred, and therefore, no evidence of the overhead rate for the contract period. *Id*. at 149,325-26.

619. ASBCA Nos. 47673, 48198, 48249, 48257, 99-2 BCA ¶ 30,397.

620. *Id.* at 150,272 (citing Buck Indus., Inc., ASBCA No. 45321, 94-3 BCA ¶ 27,061 at 134,848).

621. *B.R. Servs.*, 99-2 BCA ¶ 30,397 at 150,272 (citing Wilner v. United States, 24 F.3d 1397, 1401 (Fed. Cir. 1994)).

622. Value engineering is a procurement technique by which contractors either: (1) develop, prepare, and submit suggested performance methods voluntarily, and then share in any savings that may result to the government; or (2) establish a program to identify methods for performing more economically and submit these methods to the government as required by the contract. The VECP is the mechanism contractors use for such submissions. JOHN CIBINIC, JR. & RALPH NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 412-13 (3d ed. 1995).

623. 42 Fed. Cl. 369 (1998). In February 1993, the USACE awarded a contract to Rig Masters to inspect, operate, maintain, and repair several facilities, including the Tensas-Cocodrie Pumping Plant (TCPP). *Id.* at 370-71.

624. *Id.* The value engineering clause, found at FAR 52.248-1, encourages the contractor to develop, prepare, and submit VECPs voluntarily. If the agency accepts the VECP, the contractor will receive a share in any net acquisition savings. *Id.*

proposal had merit, she determined also that any savings to the government would be "collateral savings" to this acquisition because the contract did not require Rig Masters to provide electricity to the facility. Therefore, the contracting officer found that the government would not be obligated to pay any share of the savings to Rig Masters.[625]

Rig Masters, without filing a certified CDA claim with the contracting officer,[626] filed suit seeking a share of the cost savings as a result of its VECP.[627] The USACE objected to Rig Masters' suit and filed a motion to dismiss for lack of subject matter jurisdiction. Additionally, the USACE asserted that the court lacked jurisdiction because the dispute was subject to the CDA and Rig Masters had failed to submit a properly certified claim.[628]

The court held that the primary issue was the enforceability of the FAR clause exempting VECPs from the CDA process. The court stated that a purpose of the CDA, a comprehensive reform of the claims disputes resolution process, was to provide a "comprehensive, centralized system for adjudicating contract claims against the government."[629] The court found that the FAR clause upon which Rig Masters relied attempted to remove CDA coverage from claims involving "the acceptance, rejection, or applicable sharing rates of a VECP and grants the [contracting officer] final word with respect to such disputes."[630] The court held that because the FAR provision in question implies that boards and courts are precluded from reviewing disputes over VECPs, the clause is in direct conflict with the CDA and therefore is unenforceable.[631]

Termination for Default

The CAFC Reverses and Remands A-12 case

The CAFC has added another chapter to the ongoing A-12 litigation in *McDonnell Douglas Corp. v. United States*.[632] Finding that the Navy's "default termination was not pretextual or unrelated to the Contractors' alleged inability to fulfill their obligations under the contract,"[633] the CAFC reversed the COFC's conversion of the 1991 termination. The CAFC also rejected the contractors' argument that the Navy legally could not terminate the A-12 contract for failure to make progress because the contract was not fully funded.[634] The case has been remanded to the COFC for full litigation of the default decision.[635]

The contractors were scheduled to deliver the first of eight aircraft in June 1990, and deliver the remainder of the aircraft one per month, through January 1991. In June 1990, the contractors informed the Navy that they could not meet the schedule and proposed revising the schedule and structure of the contract. The Navy changed the delivery schedule unilaterally to require initial delivery in December 1990. In November 1990, the contractors requested that the contract be restructured

625. *Id.* Even though the contracting officer determined that Rig Masters was not entitled to share in any cost savings on this contract, the contracting officer sought a waiver from the USACE Principal Assistant Responsible for Contracting (PARC) to allow Rig Masters to participate in any collateral savings that might result from its VECP. The PARC denied this request. *Id.* Rig Masters filed suit in the U.S. District Court for the Western District of Louisiana. The district court transferred the case to the COFC. *Id.* at 372.

626. *Id.* As of the date of the court's order, Rig Masters had not submitted a certified claim to the contracting officer pursuant to the CDA. *Id.*

627. *Id*. Rig Masters relied on FAR 52.248-1(e)(3) that provides that the contracting officer's decision to accept or reject all or part of any VECP, and which sharing rates to apply, is final and not subject to either the disputes clause or to litigation under the CDA. FAR, *supra* note 17, at 52.248-1(e)(3).

628. *Id.*

629. *Id.* The court went on to state that the CDA has a "broad reach," and disputes subject to it include "any express or implied contract entered into by an executive branch agency for the procurement of goods, services or disposal of personal property." *Id.*

630. *Id.*

631. *Id.* at 373. The court held that because Rig Masters submitted its VECP under the VECP clause, any dispute concerning that VECP must be made pursuant to the CDA. Therefore, without a properly certified claim submitted to the contracting officer and a contracting officer's final decision, the court lacked jurisdiction over the issue. *Id.* The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council proposed a new rule in May 1999 to implement the CAFC's decision in *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854 (Fed. Cir. 1997) and the COFC's decision in *Rig Masters*. 64 Fed. Reg. 24,472 (1999). The proposed rule will amend the FAR to ensure that the CDA applies to all disputes arising under a government contract, unless a more specific statute provides another remedy. *Id.* The proposed rule will affect FAR 16.405-2, FAR 16.406, FAR 48.103, FAR 52.219-10, FAR 52.219-26, FAR 52.226-1, FAR 52.248-1, and FAR 52.248-3.

632. 182 F.3d 1319 (Fed. Cir. 1999).

633. *Id*. at 1326. The "contractors" are McDonnell Douglas Corp. and General Dynamics Corp.

634. *Id*. at 1330. The fixed-price incentive contract, with a ceiling price of $4,777,330,294, was incrementally-funded. The contract provided for installment payments over the five-year contract term. On the day the Navy terminated the contract for default, a scheduled payment of $553 million was due. *Id*. at 1323.

635. The Navy has the burden of proving that the contractors were in default. Part of meeting this burden will likely include rebutting the contractors' contention, contained in its response to the Navy's cure notice, that the delivery schedule was invalid and unenforceable. *Id*. at 1323.

as a cost-reimbursement type contract. The Navy refused to restructure the contract and terminated the contract for default in January 1991.

Nearly five years after the contractors filed suit in the COFC, that court vacated the default termination and converted it to a termination for convenience.[636] Finding this case to be "strikingly similar" to *Schlesinger v. United States*,[637] the COFC concluded that the contract was not terminated because of contractor default, but because the Secretary of Defense withdrew support and funding from the A-12 program. The court also found that no one in the DOD exercised discretion in choosing to terminate the contract for default.[638]

On appeal, the CAFC reviewed the factual record to determine whether the termination was arbitrary or capricious. The CAFC addressed the COFC's reliance on *Schlesinger*, stating "[i]n short, Schlesinger bars only a termination for default in which there is no considered *nexus* between the default termination and the contractor's performance under the contract."[639] Upon review of the contracting officer's testimony,[640] the court concluded the Navy's decision to terminate was not a pretext for termination based on reasons unrelated to contract performance. Rather, the CAFC found that the Navy "properly terminated the A-12 program for reasons [contract specifications, schedule, and price] related to contract performance."[641] Because the government exercised the discretion necessary to terminate the contract for default, the CAFC reversed the COFC's decision.

The CAFC also addressed the contractors' contention that the Navy's incremental funding of the contract precluded a termination for failure to make progress. The contractors charged that they had no obligation to perform work that was not fully funded. The CAFC rejected this argument, pointing out that the installment funding was not a condition to the contractors' performance. Additionally, the contract's termination clause included a right to terminate for failure to make progress.[642] Finally, the contract included a delivery schedule, under which the contractors were to deliver the first A-12 in December 1990. The CAFC concluded that as long as the contract was funded, the contractors had a duty to make progress so as not to endanger performance.

On remand, the COFC must now determine whether the A-12 contractors were in default. Considering the issues and dollars at stake, do not expect a quick resolution of this case.

ASBCA Holds Doctrine of Substantial Compliance Applies to Delivery Made During Show Cause Period

May the words and actions of the government after issuing a show cause notice vitiate the show cause language? That is the lesson of *Radar Devices, Inc.* (RDI),[643] where the ASBCA found that the government's post show cause notice language and actions gave the contractor a chance to cure its late delivery.

The contract between the Sacramento Army Depot and RDI was for radio receiving systems (units). The base year called for a first article and delivery of eighty-four units. The government modified the contract to increase the deliverables in the base year to 179 and extended the delivery date for the first article on three separate occasions. After first article approval, the parties executed bilateral modifications requiring delivery of the first eight units on 8 September 1991, with the government's technical representative to accept the units at RDI's plant.

The government issued a cure notice on 27 August, asserting its belief that RDI's lack of progress was endangering performance of the contract. On 9 September, the day after the scheduled delivery of the units, the government provided RDI with the standard FAR "show cause" notice.[644] The notice did not

636. McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358 (1996).

637. 390 F.2d 702 (Cl. Ct. 1968). Schlesinger had a contract to supply 50,000 service caps to the Navy. At the time Schlesinger failed to make the initial delivery under his Navy contract, he testified as a prime suspect before a Senate subcommittee concerning military textile procurement irregularities. After the Navy received a letter from the subcommittee chair implying that the contract should be terminated, the contracting officer terminated Schlesinger's contract. The court overturned the default termination, finding that though Schlesinger was in technical default, no one in the Navy, including the contracting officer, had exercised the requisite discretion to terminate the contract validly. The court held: "Plaintiff's status of technical default served only as useful pretext for the taking of action felt to be necessary on other grounds unrelated to the plaintiff's performance or the propriety of an extension of time." *Id.* at 709.

638. *McDonnell Douglas Corp*., 35 Fed. Cl. at 370.

639. *McDonnell Douglas Corp.*, 182 F.3d at 1326 (emphasis in original).

640. Finding that the contracting officer, Admiral Morris, terminated the contract for failure to make progress and failure to meet contract requirements, the court distinguished this case from *Schlesinger* and its progeny: "We think it clear beyond any doubt that Admiral Morris, unlike the contracting officer in Schlesinger, or in other cases that have upset terminations for default for lack of nexus to contract performance behavior, made his choice for reasons related to contract performance." *Id.* at 1328.

641. *Id.* at 1327.

642. FAR, *supra* note 17, at 52.249-9 (a)(1)(ii).

643. ASBCA No. 43912, 99-1 BCA ¶ 30,223. This was RDI's first government contract.

specify the time of day when the ten-day show cause period would expire. The last paragraph of the notice provided:

> Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, *and it is not the intention of the Government to condone any delinquency or to waive any rights the government has under the contract*.[645]

Three days after receiving this notice, the contracting officer told RDI that it had ten days to cure the deficiencies and that "after that it may be a good contract."[646] On 12 September, RDI responded in writing to the show cause notice. RDI stated that the subsystems for the eight units were completely assembled, and testing was in progress. One week later, RDI supplemented its show cause response, stating that it understood that tender of compliant units would satisfy the show cause, and all units had been tested and were ready for delivery.[647]

The contracting officer arranged to accept the eight units on 20 September. The contracting officer prepared a default termination notice in advance of the trip in case RDI did not deliver.[648] When the contracting officer and his technical representative arrived at RDI's plant on 20 September, two of the units did not work. The contracting officer did not inspect the six complete units, or allow RDI time to fix the two deficient units.[649] At approximately 9:00 a.m., the contracting officer terminated the contract for default.[650]

After stating that a termination for default is a drastic sanction, the board held that the parties informally agreed to delivery on 19 September, which the government extended to 20 September for the convenience of the contracting officer.[651] As for the two units containing minor defects, the board found that the government terminated the contract prematurely without allowing RDI the opportunity to make corrections.[652] The ASBCA stated that a reasonable contracting officer would have given RDI a chance to make the required minor repairs.[653]

Six Days Is Sufficient Response Time to Show Cause Notice[654]

A roofing contractor received a contract to repair five barracks building roofs at Fort Wainwright, Alaska. Near the end of contractor's performance, the roof manufacturer inspected the work to determine whether it could give the Army the five-year warranty required by the contract. The roof manufacturer discovered defects in the work requiring correction by the contractor. After the passage of the contract completion date, the Army made numerous demands of the contractor to furnish a repair schedule and twice told the contractor the contract would be terminated for default if the repairs were not made. After the contractor made several promises to correct the work but failed to make progress, the Army issued a show cause notice. The notice gave the contractor six days to respond, and the contractor timely provided the contracting officer with its response. Seven days after issuing the show cause notice, the contracting officer terminated the contract for default.[655]

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644. *See* FAR, *supra* note 17, at 49.607 (containing the standard formats for cure and show cause notices).

645. *Radar Devices, Inc*., 99-1 BCA ¶ 30,223, at 149,523 (emphasis added).

646. *Id*. The ASBCA held that the contracting officer negated the last paragraph of the show cause notice when he told RDI that it had ten days to cure the deficiencies. The board said that RDI reasonably understood that delivery of the eight units by the end of the show cause period would cure the delinquency. The government's actions, in effect, extended the delivery date to 19 September. *Id.* at 149,526.

647. *Id.* at 149,524.

648. The notice listed as reasons for RDI's termination (1) failure to timely deliver on 8 September, (2) failure to produce units complying with the contract specifications, and (3) failure to identify excuses for its delinquent performance. *Id.* at 149,525.

649. The contracting officer's technical representative stated that he would have inspected the units. However the contracting officer refused to begin inspection and acceptance testing because he didn't want to give RDI any reason for delay. *Id.*

650. The board found that RDI repaired the two units in less than one hour and was ready to deliver the eight units by 3:00 p.m. *Id*. at 149,527.

651. *Id.*

652. *Id*. (citing Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966) (holding that to qualify for protection under the doctrine of substantial compliance, there must be: timely delivery; contractor's good faith belief the supplies conform with the contract requirements; and minor defects that can be corrected within a reasonable period of time)).

653. *Radar Devices, Inc*., 99-1 BCA ¶ 30,223 at 149,528. Two dissenting board judges would have denied the appeal, as they believed that the government had neither waived the 8 September delivery date or the right to accept the units without condoning the delinquency. *Id.*

654. *Nisei Constr. Co., Inc*., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448.

655. *Id.* at 150,443. The basis for the termination was contractor's failure to correct deficient work in a timely manner and failure to develop a credible plan to make the repairs.

The contractor appealed to the ASBCA and argued that the default termination should be converted to one for the government's convenience. One of the contractor's arguments concerned the six-day response time to the Army's show cause notice.[656] The contractor contended that the FAR required a ten-day response time to a show cause notice. The ASBCA rejected this position, holding that neither the Default clause[657] nor the precatory language in FAR 49.607[658] imposed a ten-day response requirement on the government. Accordingly, the board denied the contractor's motion for summary judgment.[659]

Delivery Schedule Not Waived in Incremental Delivery Contract

The Air Force did not waive the delivery schedule by waiting to terminate the contract fifty-eight days after a missed delivery, held the ASBCA in *Electro-Methods, Inc*. (EMI).[660] EMI was to deliver thirteen rear compressor case assemblies (assemblies) to the Air Force over the course of four months, beginning on 30 June 1996. Approximately one month after EMI missed its first delivery, it advised the government that "parts are running." In cases of missed delivery, EMI customarily continued performance unless told by the customer to stop. The Air Force's contracting officer testified that he was unaware of EMI's continued performance from 1 July to 7 August.

After EMI failed to make the scheduled 31 July delivery, the contracting officer issued a show cause notice to which EMI responded.[661] Before deciding to terminate the contract for default, the Air Force invited EMI to supplement its show cause response. The Termination Contracting Officer (TCO) then reviewed the contract file, the show cause response, the non-delivery of two incremental shipments, the lack of a requirement for the parts, possible waiver of the delivery schedule, and the factors prescribed in FAR 49.402-3.[662] The TCO terminated the contract on 27 August.

On appeal, the ASBCA held that EMI failed to prove that the Air Force had waived the delivery schedule, and upheld the termination.[663] Because EMI customarily continued performance after missing delivery dates, the board found that its continued performance was not a result of Air Force inducement. The small amount of work that EMI performed during the forbearance periods,[664] without clear proof of government knowledge, did not establish detrimental reliance.[665]

Changes to Contract Work Don't Excuse Refusal to Perform

In *DTM Construction Corp*.,[666] a construction contractor to the VA was hired to paint and seal coat thirteen buildings. Before beginning work, the contractor's president advised the VA that the buildings contained lead paint.[667] As a result, the contracting officer suspended contract performance. Once the

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656. *Id.* The contractor also argued unsuccessfully that it was entitled to a termination for convenience because (1) the Army waived the contract's completion date, (2) the contracting officer failed to consider the FAR factors prior to terminating the contract, and (3) the contracting officer failed to send the show cause notice immediately upon expiration of the contract completion date of 30 September.

657. *Id.* at 150,444. The contract included the default clause for fixed-price construction contracts found at FAR 52.249-10. The clause does not require a show cause notice to be issued prior to terminating a contract for default.

658. The FAR provides formats for cure and show cause notices. *See* FAR, *supra* note 17, at 49.607 (providing for a 10-day response period).

659. *Nisei Constr. Co., Inc*., 99-2 BCA ¶ 30,448 at 150,445.

660. ASBCA No. 50215, 99-1 BCA ¶ 30,230.

661. The ASBCA noted the show cause notice advised the contractor that "it is not the intention of the Government to condone any delinquency or to waive any rights the government has under the contract." *Id.* at 149,562. This was the same language found ineffectual by the board in *Radar Devices, Inc*. *See supra* notes 645-656 and accompanying text.

662. *See* FAR, *supra* note 17, at 49.402-3 (listing procedures for default terminations).

663. *Electro-Methods*, 99-1 BCA ¶ 30,230 at 149,565. The dissenting judges in *Radar Devices* concurred in this decision. *See supra* notes 645-656 and accompanying text.

664. The contractor made seven percent progress for the June deliverables, and one percent progress for the July deliverables. *Electro-Methods*, 99-1 BCA ¶ 30,230 at 149,564-65.

665. *Id*. The board noted that the elements of waiver include (1) the failure to terminate within a reasonable period of time under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance under the contract, with the government's knowledge and implied or express consent. *Id.* at 149,564 (citing DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969)). The board did not address whether the period of delay, the first *DeVito* element, was reasonable.

666. VABCA No. 4712, 99-1 BCA ¶ 30,306.

667. *Id.* According to the contracting officer's technical representative (COTR), the news of lead-based paint "came out of the clear blue." *Id.* at 149,860. The board found the COTR's surprise "reminiscent of Claude Rains' 'shock' in *Casablanca* of learning that there was gambling at Rick's place." *Id.* at 149,864.

VA confirmed the presence of lead paint, it directed the contractor to proceed with some of the work and to provide a proposal for deleting the remaining work.

The parties disagreed on how to price the remaining work. After evaluating the contractor's initial proposal, the VA directed the contractor to resubmit an itemized cost proposal. Additionally, for the third time, the VA requested the contractor's environmental protection plan. The contractor responded by stating that it would not submit a plan until the VA agreed to one of the contractor's two pricing proposals.

The VA issued a cure notice to which the contractor never responded. The contractor also never returned to work. Accordingly, the VA terminated the contract for default. Though the board was troubled by some of the facts of the case,[668] it upheld the termination. Finding that the contractor's dispute involved an equitable adjustment, the board held that it did not excuse abandonment of the contract.

Termination for Convenience (T4C)

The CAFC Emphasizes that a "Cardinal Change" Is Not Necessary for T4C

Soon after awarding T&M Distributors (T&M) a contract to operate and maintain a Contractor Operated Parts Store (COPARS) on Guam, the Navy discovered it had underestimated significantly the value of the contract.[669] Prior to the start of contract performance, the Navy terminated the contract for convenience and issued a new solicitation. T&M did not receive the second solicitation's award.

Following the termination, T&M submitted its T4C settlement proposal and a breach of contract claim seeking over $1.3 million in anticipated profits. The parties agreed on the settlement costs, but the Navy denied the breach claim. The contractor filed suit and lost at the COFC. The COFC held that the contracting officer did not abuse his discretion to terminate the contract because the increase in the estimated requirements was a "cardinal change." T&M's appeal to the CAFC followed.

T&M contested the COFC's finding of a cardinal change by arguing that the Navy's requirements didn't change from the first to the second solicitation.[670] The contractor also alleged that prior CAFC decisions[671] narrowed improperly the holding in *Torncello v. United States*.[672] The CAFC refused to consider whether a cardinal change existed under the facts. Instead, the court restated the proposition that a cardinal change is not a prerequisite to a convenience termination.[673] The CAFC affirmed the COFC because the contracting officer terminated the contract to obtain full and open competition.[674]

Does Facsimile Notice Start the One-Year Clock for Settlement Proposal?

You cannot win the argument if you do not have the evidence. That is the lesson of the ASBCA decision in *Voices R Us*.[675] The government moved for summary judgment on the ground that the contractor, because it had submitted an

668. *Id.* In addition to the agency's failure to identify the presence of lead before soliciting bids, the VA did not seek verification of the contractor's bid, despite it being 30% lower than the next low bid, and 47% lower than the median bid.

669. T&M Distributors, Inc. v. United States, No. 98-5106, 1999 U.S. App. LEXIS 17030 (Fed. Cir. July 26, 1999). After a government attorney made an investigative trip to Guam, the Navy determined that the estimate for the base and four option years should have been approximately $4.5 million, rather than the $595,250 under the awarded contract. *Id.* at *5.

670. T&M stressed that its contract was a requirements contract, under which T&M was required to satisfy all of the Navy's requirements for support of Guam's vehicle fleet–regardless of the estimate. Since the Navy's requirement was for parts necessary to support Guam's vehicles, and there was no material change in the number of vehicles in Guam's fleet, there was no material change to the required purchases of the contract. Therefore, there was no cardinal change to support the termination. *Id.* at *12.

671. Krygoski Const. Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996); Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578 (Fed. Cir. 1995); Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990).

672. 681 F.2d 756 (Ct. Cl. 1982). The CAFC rejected the argument that it had interpreted *Torncello* incorrectly in its later decisions, and reemphasized the limited holding in *Torncello*, in stating:

> We have in fact rejected the suggestion that dicta of a plurality opinion in Torncello imposed a special requirement of 'changed circumstances' on the government's right to terminate for its convenience. . . . [Torncello] stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause.

T&M Distributors, 1999 U.S. App. LEXIS 17030, at *17 n.4 (citations omitted).

673. *T&M Distributors*, 1999 U.S. App. LEXIS 17030, at *15.

674. *Id.* at *16.

675. Voices R Us, Inc., ASBCA No. 51565, 99-1 BCA ¶ 30,213.

untimely settlement proposal, had forfeited its right to appeal the contracting officer's "no-cost" settlement determination.[676] The contractor had submitted its proposal within one year of receiving the hard copy of the government's notice of contract termination. The government, however, alleged it had sent the contractor a facsimile notice more than one year before the contractor submitted its settlement proposal.[677]

The board did not have to address whether a facsimile notice could start the clock for purposes of submitting a termination settlement proposal.[678] Because the government offered "no affidavit, declaration or record of fax transmissions" in support of its notice argument, the only evidence before the board concerned the government's hard copy notice. As a result, the board found that the contractor had submitted its proposal timely.[679]

Contractor May Recover Unamortized Labor Learning Costs Following T4C

Before deciding to partially terminate a contract for convenience, contracting officers should consider the costs associated with a contractor's unamortized labor learning.[680] As the CAFC emphasized in *VHC, Inc. v. Peters*,[681] in cases of partial termination a contractor may request an equitable adjustment for the continued portion of the contract.

VHC requested an equitable adjustment for its unamortized labor learning costs nearly three years after the Air Force terminated work under an exercised option.[682] The contracting officer denied the claim, and VHC appealed to the ASBCA. The board found that because VHC's pricing was not level over the entire contract, the contractor could not have expected to recover its unamortized labor learning costs. In support of its decision, the board relied on *Bermite Division of Tasker Industries*.[683]

The court found the board erred in relying on *Bermite* because VHC's contract did not involve renegotiated unit pricing. In addition, the court rejected the Air Force's arguments that centered on the contractor's expectations at the time of contract award.[684] Instead, the court held that the proper focus was on the contractor's actual incurred costs at the time of termination. The court reversed and remanded the case for a determination whether VHC had experienced positive labor learning during the unterminated portion of the contract.[685]

Contractor Entitled to Work-in-Process Costs Despite Throwing Inventory Away

The COFC's holding in *Industrial Tectonics Bearing Corp. v. United States*[686] reminds contracting officers of the importance of issuing clear directions concerning disposal of termination inventory. Following the partial termination of its steel

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676. Under either the "long-form" or "short-form" standard termination clause, the contractor must submit its settlement proposal within one year from the effective date of contract termination. The effective date is defined as the date on which the termination notice requires the contractor to stop performance, or the date the contractor receives the notice, whichever is later. *See* FAR, *supra* note 17, at 49.001.

677. Had the contractor received the facsimile transmission, its proposal would have been one day late. Failure of the contractor to submit its settlement proposal timely allows the contracting officer to determine the settlement amount unilaterally. The contractor has no right to appeal the contracting officer's unilateral decision. *Id.* at 52.249-2(j).

678. Contracting officers must terminate contracts by written notice. *Id*. at 49.102(a). The FAR also provides guidance for telegraphic and letter notice. FAR, *supra* note 17, at 49.601-2 (providing that the letter notice is to be sent by certified mail, return receipt requested). For examples of possible arguments that the respective parties could make in a facsimile notice case, see *Appeal Raises But Does Not Decide Whether FAX Transmission Can Start Period For Filing Termination Settlement Proposal*, 41 THE GOV'T CONTRACTOR NO. 12, at 11 (Mar. 24, 1999).

679. *Voices R Us, Inc*., 99-1 BCA ¶ 30,213 at 149,478.

680. The contractor proves this cost through use of a learning curve, which shows that the direct labor hours required to produce a unit decline as more units are produced. VHC Inc. v. Peters, 179 F.3d 1363, 1366 (Fed. Cir. 1999).

681. *Id*. at 1363. The unamortized labor expense is not part of the termination settlement. The contractor's remedy is an equitable adjustment to recover a portion of the higher labor costs incurred in producing the delivered items.

682. Although the clause at FAR 52.249-2(l) requires the contractor to files its equitable adjustment request within 90 days of the termination's effective date, the Air Force did not raise in its pleadings the affirmative defense of untimeliness. The ASBCA found the Air Force waived the defense. *Id*. at 1365 n.3.

683. ASBCA No. 18280, 77-1 BCA ¶ 12,349. The Bermite contract was a multi-year contract that had one unit price for all of the deliverables. At the same time that the parties renegotiated the prices for the fifth and sixth program years, the government had canceled production for the seventh and eighth years. When the contractor sought recovery of unamortized labor learning costs, the ASBCA allowed it for only the first four years. The *Bermite* board assumed that the contractor had accounted for the lost labor learning in years five and six when it agreed on the renegotiated prices.

684. The Air Force argued that the contractor's different pricing for the base and two option periods proved it did not expect to amortize its labor learning costs. In addition, because the Air Force was not required to exercise the option years, the contractor could not have expected to amortize the labor learning costs. *VHC Inc*., 179 F.3d. at 1367.

685. *Id.* at 1368.

bearing retainer contract with Industrial Tectonics, the government conducted a plant clearance inspection and discovered that the contractor's employees threw away the work-in-process inventory. When the contractor requested its costs for the work-in-process inventory, the contracting officer denied the entire request on the ground that it had not authorized the contractor to dispose of the inventory. Industrial Tectonics filed suit at the COFC and moved for summary judgment on the issue of entitlement to its work-in-process costs.

The court, after stating that missing termination inventory is "not uncommon in supply contracts,"[687] rejected the government's contention that it could pay the contractor only if it delivered the inventory. The court stated that "[a]bsent fraudulent conduct or conduct grossly in disregard of its contract obligations, the authorities do not require that all incurred costs and reasonable profit be denied the contractor."[688] The court further stated that "loss of inventory generally results in the deduction of its 'fair value' from the entire cost figure payable to the contractor,"[689] and held that this was the proper measure of recovery.[690]

Impasse Required Before Interest Accrues on Termination Settlement

In two separate decisions, the ASBCA held that CDA interest did not accrue until the parties reached an "impasse' in their negotiations. The board cited the CAFC decision in *Ellet Construction Co., Inc. v. United States*[691] in support of its decision in both cases.

In *Mediax Interactive Technologies, Inc.*,[692] the ASBCA affirmed its March 1999 decision[693] in which it awarded interest from the date the government received the contractor's 1991 claim. On motion for reconsideration, the contractor argued that interest accrued from its submission of its 1984 convenience termination proposal because it was a "non-routine claim for payment." The board disagreed, stating that the record did not establish that negotiations had reached an impasse. After the contractor submitted its settlement proposal, the Defense Contract Audit Agency (DCAA) audited the proposal and the parties conducted negotiations. Lacking an earlier date of impasse, the board used the date the government received the contractor's certified claim as the date interest began to accrue.[694]

In the second case, *Rex Systems Inc.*,[695] the ASBCA denied entitlement to interest.[696] The ASBCA recognized that the contractor had requested orally that the contracting officer negotiate a settlement or issue a final decision, but subsequently only pursued negotiation of a settlement. Despite general complaints about the delays in negotiating a settlement (it took three TCOs and two and one-half years to settle the termination), the board found no evidence of an impasse and affirmed its decision on reconsideration.[697]

ASBCA Rules that Fixed Price Incentive Target Price Is Used to Calculate Loss Adjustment

In *Boeing Defense & Space Group*,[698] a case of apparent first impression, the ASBCA ruled that the parties should use the target price,[699] rather than the ceiling price,[700] to calculate a loss adjustment on a hybrid contract.

Boeing received a 1987 contract from the Air Force for design, development, testing, and production of the Short Range Attack Missile II (SRAM II). Eight of the contract line items (CLINs) were priced on a fixed-price-incentive-fee basis,

686. 44 Fed. Cl. 115 (1999).

687. *Id.* at 119.

688. *Id.* at 120.

689. *Id.* at 119.

690. *Id.* at 120.

691. 93 F.3d 1537 (Fed. Cir. 1996).

692. ASBCA No. 43961, 99-2 BCA ¶ 30,453.

693. Mediax Interactive Technologies, Inc., ASBCA No. 43961, 99-2 BCA ¶ 30,318.

694. *Id.* at 150,457.

695. ASBCA No. 49502, 99-1 BCA ¶ 30,179. This was one of sixteen appeals by contractor Rex Systems seeking interest on amounts it received in settlement of convenience terminations.

696. *Id.* at 149,317. Despite the requests of the parties to use this appeal as the "test" case for all of its appeals, the board made clear that its analysis and decision were valid only for the instant case. The board recognized that the decision might nevertheless provide the parties with enough guidance to resolve the other cases.

697. Rex Sys. Inc., ASBCA No. 49502, 99-1 BCA ¶ 30,377.

while other CLINs were firm-fixed-price. In 1990, the Air Force issued a unilateral contract modification ordering Boeing to develop the SRAM T, a variant of the SRAM II, for use on the F-15E tactical aircraft. At the time of the SRAM T modification, the Air Force expected Boeing to lose money on the SRAM II, but to profit on the SRAM T. The Air Force obligated separate funds for the SRAM T effort and included a "Limitation of Government Liability" clause with a "Not to Exceed" ceiling price. The parties treated the SRAM II and SRAM T separately for financial purposes.

The Air Force terminated the entire contract in 1991. Because the parties disagreed on how to calculate the loss adjustment, Boeing appealed to the ASBCA. The Air Force argued for multiple termination calculations for the SRAM II and SRAM T portions of the contract. Boeing argued for a single loss adjustment for the entire contract. The board held for Boeing and remanded the case to the parties to determine quantum.[701]

When the parties' calculations resulted in a difference of $9.6 million, they submitted legal memoranda to the ASBCA and jointly requested entry of judgment. The sole issue before the board concerned the proper calculation of "total contract price." The board sided with the Air Force, holding that where the SRAM T fixed price items would have been produced at target price, the correct component of the "total contract price" for those items was the target price.[702] The board stated that a contrary holding would provide Boeing with "a windfall inconsistent with the loss adjustment provision of the contract."[703]

Contract Disputes Act[704] Litigation

What Constitutes a Government Claim?

Both the ENGBCA and the COFC addressed this question during the past year. In *Bean Horizon-Weeks (JV)*, the ENGBCA held that a post-appeal letter from the contracting officer demanding repayment of $1,166,188 for improper work was a government claim.[705] In so doing, the ENGBCA distinguished its decision in *Mobley Contractors, Inc.*,[706] as well as the CAFC's decision in *Sharman Co. v. United States*.[707] In addition, the ENGBCA noted that the USACE's failure to comply with the normal two-step process for asserting a government claim was irrelevant since the process was designed to benefit the contractor, and the contractor could waive noncompliance with it.[708]

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698. ASBCA No. 51773, 98-2 BCA ¶ 30,069. The board wrote:

> Neither the parties' briefs on quantum, nor our independent research, have disclosed any precedent or legal authority which decided what is the "total contract price" for purposes of calculating a convenience termination loss adjustment of a hybrid contract with firm fixed price items and fixed price incentive fee line items whose estimated costs at completion would be at target and over ceiling.

Id. at 148,786.

699. The target price is the sum of the target cost and target profit in a fixed-price-incentive contract. RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 506 (2d ed. 1998).

700. The ceiling price is the maximum price that the government will pay regardless of the cost of performance. *Id.* at 85.

701. Boeing Defense & Space Group, ASBCA No. 50048, 98-2 BCA ¶ 29,779. The board also held that the costs of delivered CLINs must be included in the termination settlement loss calculation. *Id.* at 147,561.

702. *Id.* at 148,786.

703. *Id.*

704. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C.A. §§ 601-613 (West 1999)).

705. ENGBCA No. 6398, 99-1 BCA ¶ 30,134. The underlying contract in this case required Bean Horizon-Weeks Marine (JV) to use offshore dredging to replenish a beach. Before filing the current appeal, Bean had filed a claim for extra costs and appealed to the ENGBCA. After the hearing on the first appeal, the contracting officer issued a letter that accused Bean of dredging outside the authorized borrow limits. The same letter indicated that the USACE could not pay Bean for materials it had dredged improperly and requested repayment of $1,166,188. *Id.* at 149,059.

706. *Id.* In *Mobley*, the Army's Suspension Official (ASO) responded to Mobley's offers to lift the suspension; however, the ASO did not demand the repayment of money as a matter of right. *Id. See* Mobley Contractors, Inc., ENGBCA No. 5655, 90-3 BCA ¶ 23,031. In contrast, the contracting officer's letter in *Bean* described the legal and factual basis for the USACE's claim and demanded unequivocally the repayment of money. As a result, the contracting officer's letter in *Bean* was clearly an affirmative government claim. *Id.* at 149,059-60.

707. *Id.* at 149,059. In *Sharman*, the contracting officer sought a refund of unliquidated progress payments; however, the CAFC characterized the contracting officer's letter as a tentative determination because the contracting officer invited the contractor to negotiate the amount of the refund. *Id. See* Sharman Co. v. United States, 2 F.3d 1564 (Fed. Cir. 1993), *overruled in part by* Reflectone, Inc., v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995). In contrast, the contracting officer's letter in *Bean* stated the USACE's position with finality. The contracting officer did not invite Bean to negotiate. Instead, the contracting officer demanded the repayment of $1,166,188. *Bean*, 99-1 BCA ¶ 30,134 at 149,059-60.

In *Newport News Shipbuilding and Dry Dock Co.*,[709] the COFC held that a letter entitled "Determination of Noncompliance With [Cost Accounting Standard (CAS)] 415"[710] was a government claim, even though the contracting officer did not designate the letter as a "final decision" or demand a sum certain.[711] The court found that the contracting officer's determination would have an immediate effect on Newport News Shipbuilding and Dry Dock Company (Newport News) because it required Newport News to change its accounting practices for future CAS contracts.[712]

Federal Aviation Administration (FAA) Ordered to File Complaint in Appeal of Government Claim

In an unusual move, the Department of Transportation Contract Appeals Board (DOTCAB) ordered the FAA to file the complaint in *Northrop Grumman Corp.*[713] The FAA's claim stemmed from its modification of the Air Route Surveillance Radar Model 4 (ARSR-4) contract.

The modification required Northrop Grumman to: (1) provide 5000 L-Band Silicon High Power Transistors; and (2) establish itself as a "second source" for the transistors. The negotiated price for each transistor was $759.60. The modification, however, included a clause that allegedly permitted Northrop to request a price adjustment to reflect the "actual manufacturing ratio" between itself and its supplier.[714] Based on this clause, Northrop submitted an adjustment proposal requesting $15,401.

The parties subsequently began to trade counteroffers. The FAA requested Northrop to pay $19,535,[715] and Northrop countered by reducing its initial request to $8780. Two days later, the FAA increased its claim to $1,580,031. Then, following additional negotiations, the FAA increased its claim again. On 12 May 1998, the FAA's contracting officer issued a final decision demanding payment in the amount of $3,156,514.[716]

Northrop appealed to the DOTCAB and elected to proceed under the board's regular procedures. Northrop, however, did not want to file the complaint. Instead, Northrop wanted the FAA to file the complaint so that it could respond in an "informed and appropriate manner."[717] Northrop argued that requiring the FAA to file the complaint would help expedite the appeal because Northrop did not understand the legal or factual basis of the FAA's claim, and the DOTCAB agreed. After noting the complexity of the case and the substantial increase in the amount of the FAA's claim, the DOTCAB concluded that the FAA should file the complaint in this case.[718]

Is a Termination Settlement Proposal a Claim?

In *Walsky Construction Co.*,[719] the CAFC held that a termination settlement proposal was not a claim, although it was valid on its face.[720] Based on its previous decision in *James M. Ellett Construction Co. v. United States*, the CAFC first concluded that the termination settlement proposal was "just that: a proposal."[721] The CAFC then concluded that negotiations had not yet reached an impasse when Walsky Construction Co. filed

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708. *Bean*, 99-1 BCA ¶ 30,134 at 149,060. The FAR normally requires the government to give the contractor notice and an opportunity to respond to an affirmative government claim before the contracting officer renders the final decision. *See generally* FAR, *supra* note 17, subpt. 32.6.

709. No. 98-183C, 1999 U.S. Claims LEXIS 203 (Fed. Cl. Aug. 18, 1999).

710. *Id.* at *15. The contracting officer issued the "Determination of Noncompliance With CAS 415" on 5 November 1997, after giving Newport News an opportunity to respond to the "Initial Finding of Noncompliance with CAS 415" the contracting officer issued on 26 February 1997. *Id*. at *3.

711. *Id*. at *15. In its opinion, the COFC stated that "[f]ailure by the [contracting officer] to explain the nature of the disagreement with [Newport News], or to include the 'magic words' of a 'final decision,' does not change the clear circumstances and content of the determination." *Id.* at *11-*12. The court then stated that the contracting officer's letter would constitute a government claim "even if [Newport News] were assessed zero costs for its alleged failure to meet CAS 415 in the past." *Id.* at *15.

712. *Id.* at *9-*10 (distinguishing *Sharman* based on the "imminent certainty of harm" to Newport News). In holding that the contracting officer's letter constituted a government claim, the COFC essentially adopted the same "jurisdictional understanding" of the CDA as the ASBCA. *Id.* at *6-*8.

713. DOTCAB No. 4041, 99-1 BCA ¶ 30,191.

714. *Id.* at 149,411. The parties expected Northrop's supplier to manufacture some of the required transistors. *Id.*

715. *Id*. The government apparently based its demand on the belief that the modification did not allow Northrop to recoup the development costs it incurred to establish itself as a "second source" for the transistors. *Id.*

716. *Id.* The FAA apparently believed that Northrop owed it over $2.4 million for development costs that Northrop improperly allocated to the modification, as well as $713,776 in interest. *Id*. at 149,412.

717. *Id.*

718. *Id.* at 149,413 (citing LGT Corp., ASBCA No. 44066, 93-3 BCA ¶ 26,184 at 130,341).

719. No. 98-5112, 1999 WL 13376 (Fed. Cir. Jan. 11, 1999) (unpub.).

its complaint in the COFC. In fact, the court noted that negotiations had not even begun when Walsky filed suit.[722] As a result, the CAFC affirmed the COFC's decision to dismiss Walsky's complaint for lack of jurisdiction.[723]

Certification in Standard Form (SF) 1436 Satisfies CDA Certification Requirement for Claims Over $100,000

In addition to concluding that Metric's termination settlement proposal had ripened into a claim in *Metric Constructors, Inc.*,[724] the ASBCA discussed whether a contractor can correct the certification in a SF 1436, Settlement Proposal (Total Cost Basis),[725] to satisfy the certification requirements for claims over $100,000.[726] In the past, the ASBCA has refused to exercise jurisdiction where the only certification the contractor submitted was the certification in the SF 1436.[727] The ASBCA has always held that the differences between the certification in the SF 1436 and the required certification were not correctable. The ASBCA, however, decided to reexamine its previous decision in light of the following discussion in *James M. Ellett Construction Co. v. United States*:[728]

> The government's final argument, that because the termination settlement proposal was not properly certified, the court lacked

720. *Id.* at *3 (quoting James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996)). The termination settlement proposal was a non-routine submission that sought, as a matter of right, the payment of money in a sum certain. Therefore, the CAFC concluded that the termination settlement proposal met the FAR requirements for a valid claim. *Id.* at *2-*3. *See* FAR, *supra* note 17, at 33.201 (defining a claim as "a written demand . . . seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract").

721. *Walsky Constr. Co.*, 1999 WL 13376 at *3. On 24 July 1990, the government terminated Walsky's fixed-price construction contract for default; however, the ASBCA converted the termination for default into a termination for the convenience of the government on 30 July 1993. In response, Walsky submitted a termination settlement proposal, which the government forwarded to the DCAA to audit on 26 January 1995. Eleven months later, Walsky filed its complaint in the COFC, alleging a deemed denial. The COFC then dismissed Walsky's complaint for lack of jurisdiction, and Walsky appealed to the CAFC. *Id.* at *1-*2. *See* FAR, *supra* note 17, at 33.211(g) (stating that "[a]ny failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim").

722. *Walsky Constr. Co.*, 1999 WL 13376 at *3. Walsky sent the contracting officer a letter in August 1995 asking the contracting officer to advise it when the government planned to set a negotiations date. The contracting officer responded the next day, indicating that the government wanted to reach a mutually agreeable settlement as expeditiously as possible. The contracting officer then followed up in October to let Walsky know that its termination settlement proposal was still pending legal review. *Id.*

723. *Id.* The court stated:

> [T]he Court of Federal Claims lacks jurisdiction over any claim, such as this one, which is not submitted to the contracting officer for a final decision before being appealed. The termination for convenience settlement proposal submitted by Walsky has not yet been the subject of negotiations with the government and until such time cannot be a claim upon which the contracting officer can be deemed to have denied by a lack of action on his part.

Cf. Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 551 (1999) (holding that the parties can reach an impasse without entering into negotiations if allegations of fraud prevent the contracting officer from entering into negotiations); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (holding that a termination settlement proposal ripened into a claim when the contracting officer issued a unilateral contract modification after the parties' unsuccessful negotiations).

724. ASBCA No. 50843, 98-2 BCA ¶ 30,088 at 148,940.

725. *Id.* The certification in the SF 1436 contains the following language:

> The proposed settlement . . . and supporting schedules and explanations have been prepared from the books and account records of the Contract in accordance with recognized commercial accounting practices; they include only those charges allocable to the terminated portion of this contract; they have been prepared with knowledge that they will, or may be used directly or indirectly as the basis of settlement of a termination settlement proposal or claim against an agency of the United States; and the charges as stated are fair and reasonable.

FAR, *supra* note 17, at 53.301-1436. *See id.* at 53.301-1435 (Standard Form 1435, Settlement Proposal (Inventory Basis)), 53.301-1437 (Standard Form 1437, (Settlement Proposal for Cost-Reimbursement Type Contracts)), 53.301-1438 (Standard Form 1438, Settlement Proposal (Short Form)).

726. *Metric Constructors, Inc.*, 98-2 BCA ¶ 30,088 at 148,940. FAR 33.207 requires a person "duly authorized to bind the contractor with respect to the claim" to state:

> I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

FAR, *supra* note 17, at 33.207.

727. *Metric Constructors, Inc.*, 98-2 BCA ¶ 30,088 at 148,940 (citing Chan Computer Corp., ASBCA No 46763, 96-1 BCA ¶ 28,005).

728. 93 F.3d 1537 (Fed. Cir. 1996).

> jurisdiction is also unavailing. It does not argue that the substance of the preprinted certification contained on the SF 1436 was in any way deficient. Indeed, it concedes that the "certification Ellett submitted with its settlement proposal contained similar language" to that of the CDA.[729]

Based on this language, the ASBCA "departed" from its previous decisions and concluded that a contractor may now correct the certification in a SF 1436 to satisfy the certification requirements for claims over $100,000.[730]

Supreme Court Outfoxes Ninth Circuit[731]

In September 1993, an 8(a) contractor, Verdan Technology, Inc., subcontracted with Blue Fox, Inc. to build a facility to house a telephone switching system at the Army Depot in Umatilla, Oregon.[732] Unfortunately, the prime contract did not require Verdan to furnish a payment bond.[733] As a result, Blue Fox sued the Army and the SBA in the U.S. District Court for the District of Oregon after Verdan failed to pay it $45,586 of the $186,374 subcontract price.[734] The Army moved for summary judgment, which the district court granted.[735] Blue Fox then appealed to the Court of Appeals for the Ninth Circuit, which reversed the trial court.[736]

The Supreme Court granted certiorari to determine whether the Administrative Procedures Act (APA) waives the government's sovereign immunity from suits to enforce equitable liens.[737] The Supreme Court reversed the Ninth Circuit in a unanimous decision, holding that Blue Fox's claim fell outside the scope of the APA's waiver provision because it was really a claim for monetary damages.[738]

Notice of Appeal (NOA) Timely Even Though Board Refused to Accept "Postage Due" Original

In *Thompson Aerospace Inc.*,[739] the Air Force challenged the timeliness of a contractor's NOA after it arrived at the ASBCA "postage due" and the ASBCA refused to accept it.[740] The Air Force argued that the contractor's timely service on the contracting officer was insufficient to give the board jurisdiction

729. *Metric Constructors*, 98-2 BCA ¶ 30,088 at 148,940 (quoting James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1545) (Fed. Cir. 1996)).

730. *Id*. *See* Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 551 (1999) (holding that the contractor's refusal to provide a separate CDA certification did not preclude a certified termination settlement proposal from ripening into a claim).

731. *See* Major Jody Hehr & Major Dave Wallace, *The Supreme Court "Outfoxes" the Ninth Circuit*, ARMY LAW., Aug. 1999, at 47.

732. Department of the Army v. Blue Fox, Inc., 119 S. Ct. 687 (1999). The prime contract in this case was a contract between the Army and the SBA. The SBA subcontracted with Verdan pursuant to Section 8(a) of the Small Business Act. *See* Blue Fox, Inc. v. United States Small Bus. Admin., 121 F.3d 1357, 1359 (9th Cir. 1997); *see also* 15 U.S.C.A. § 637(a) (West 1999) (establishing a business development program to assist small, disadvantaged businesses). Verdan then subcontracted with Blue Fox. *Blue Fox*, 121 F.3d at 1360.

733. *Blue Fox*, 119 S. Ct. at 688. The Miller Act normally requires a contractor to provide a payment bond for construction contracts; however, the Army had decided to treat Verdan's contract as a service contract. *Blue Fox*, 121 F.3d at 1359. *See* 40 U.S.C.A. § 637(a) (West 1999) (requiring contractors to provide performance and payment bonds for construction contracts over $100,000).

734. *Blue Fox*, 121 F.3d at 1360. Blue Fox initially sued Verdan and obtained a default judgment, but Verdan was "judgment proof." *Id*. *See* BLACK'S LAW DICTIONARY 845 (6th ed. 1990) (defining the term "judgment proof" as "descriptive of all persons against whom judgments for money recoveries have no effect, for example, persons who are insolvent, who do not have sufficient property within the jurisdiction of the court to satisfy the judgment, or who are protected by statutes which exempt wages or property from execution"). As a result, Blue Fox sought to obtain an equitable lien against: (1) any funds the Army or the SBA had retained, or (2) any funds available or appropriated to complete the telephone switching system at the Umatilla Army Depot. *Blue Fox*, 121 F.3d at 1360. *See* Blue Fox, Inc. v. United States Small Bus. Admin., No. 95-612-FR, 1996 WL 293363 (D. Or. May 24, 1996).

735. *Blue Fox*, 1996 WL 293363 at *5.

736. *Blue Fox*, 121 F.3d at 1363.

737. Department of the Army v. Blue Fox, Inc., 118 S. Ct. 2365 (1998). *See* 5 U.S.C.A. §§ 551-559, 701-06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (West 1999).

738. *Blue Fox*, 119 S. Ct. at 687. The Court stated:

> Section 702 [of the APA] does not nullify the long settled rule that, unless waived by Congress, sovereign immunity bars creditors from enforcing liens on Government property. Although [Section] 702 [of the APA] waives the Government's immunity from action seeking relief "other than money damages," the waiver must be strictly construed, in terms of its scope, in the sovereign's favor and must be "unequivocally expressed" in the statutory text.

Id. at 692.

739. ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232.

because the contractor did not direct the NOA to the contracting officer by mistake. The ASBCA disagreed.

The board began its analysis by noting that it construes NOAs liberally. The board stated that it requires a contractor to submit a written NOA within the requisite time period that: (1) expresses the contractor's dissatisfaction with the contracting officer's decision, and (2) demonstrates the contractor's intent to appeal. The board then concluded that the contractor's NOA was timely because the contractor mailed it on the ninetieth day after it received the contracting officer's letter. The fact that the ASBCA refused to accept delivery of the NOA and the contracting officer received only a copy was irrelevant.[741]

Court Retains Jurisdiction of Contractor Claim Based on Government's "Mirror Image" Claim

The HUD issued a task order to Hamilton Securities Advisory Services, Inc. on 25 April 1996, under an indefinite quantity contract to provide financial support services and auction HUD-held mortgages.[742] The task order required Hamilton to analyze bids using a computer optimization model. Unfortunately, Hamilton miscalculated the "bid floor" in two auctions, thus depriving the HUD of approximately $3,883,551.

The contracting officer sent Hamilton a letter on 17 October 1997, demanding $3,883,551 and advising Hamilton of the HUD's intent to withhold further contract payments. Hamilton treated this letter as a termination for the convenience of the government and submitted a certified claim for $1,505,256 on 10 December 1997.[743] Hamilton sued the HUD in the U.S. District Court for the District of Columbia on 8 January 1998; however, Hamilton dismissed some of the counts in its complaint voluntarily on or before 4 March 1998.[744] Hamilton then filed suit in the COFC on 9 March 1998. The HUD responded by filing a motion to dismiss for lack of subject matter jurisdiction.

The COFC began its analysis by examining Hamilton's allegation that the contracting officer denied its 10 December 1997 claim impliedly by failing to act on it within the requisite sixty days. The court considered specifically whether the district court case tolled the CDA's sixty-day deemed denial period and found that it did.[745] The court found that the counts Hamilton dismissed in its district court complaint mirrored its 10 December 1997 claim because they sought payment of the same two invoices.[746] As a result, the CDA's sixty-day deemed denial period had not yet expired when Hamilton filed suit in the COFC.[747]

The court then rejected Hamilton's remaining attempts to show that the court had jurisdiction over its claim;[748] however, the court retained jurisdiction of Hamilton's claim based on the HUD's setoff claim. The CAFC held that the contracting officer's 17 October 1997 letter constituted a final decision on a government claim.[749] In addition, the CAFC held that Hamilton's 10 December 1997 claim was the "mirror image" of the government's claim.[750] Therefore, the contracting officer's 17

740. *Id.* at 149,569. Thompson Aerospace, Inc. submitted a claim to the Air Force in August 1997. The contracting officer denied Thompson's claim by letter dated 12 February 1998 and asserted a government claim for $739,209. Thompson received this letter on 17 February 1998, and mailed its NOA to both the contracting officer and the board ninety days later, on 18 May 1998. The contracting officer accepted delivery of the "postage due" NOA on 21 May 1998; however, the ASBCA refused delivery. As a result, the Post Office returned the NOA to Thompson unopened. Thompson resubmitted its NOA to the ASBCA on 27 May 1998. *Id.* at 149,568-69.

741. *Id.* at 149,570. *Cf.* Rex Sys., Inc., ASBCA No. 50456, 98-2 BCA ¶ 29,956 (refusing to dismiss an appeal simply because the contractor failed to mail a copy of its NOA to the contracting officer).

742. Hamilton Securities Advisory Servs., Inc. v. United States, 43 Fed. Cl. 566 (1999).

743. *Id.* at 571. Hamilton based its claim on two invoices that the HUD refused to pay. Hamilton submitted the first invoice on 26 September 1997 for $868,417, and the second invoice on 23 October 1997 for $636,839. *Id.* at 570-71.

744. *Id*. at 571. Hamilton dismissed Counts 1, 2, 7, and 8 of its complaint. Counts 1 and 2 sought payment of the Hamilton's 26 September 1997 and 23 October 1997 invoices, and Counts 7 and 8 alleged that the HUD's decision to withhold its contract payments violated the due process rights. *Id.*

745. *Id.* at 574. *See* 41 U.S.C.A. § 605(c)(5) (West 1999) (stating that "[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim . . . ."); *see also* FAR, *supra* note 17, at 33.211(g).

746. *Hamilton*, 43 Fed. Cl. at 574. Hamilton argued that the district court case was distinct because it was based on the U.S. Constitution and the APA; however, the COFC held that this was "the precise difference in legal 'labels' that the CAFC found irrelevant." *Id. See* Case, Inc. v. United States, 88 F.3d 1004 (Fed. Cir. 1996) (holding that claims submitted in different litigation are the same if they "allege entitlement to the same money base on the same partial performance, only under a different label").

747. *Hamilton*, 43 Fed. Cl. at 575 (distinguishing McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 285 (1998)). The district court case tolled the CDA's 60-day deemed denial period from 8 January 1998 to 4 March 1998. During that time, the contracting had neither the obligation nor the authority to act on Hamilton's claim. Therefore, only 35 days of the 60-day deemed denial period had elapsed on the day Hamilton filed suit in the COFC. *Id.*

748. *Id.* at 575-76. Hamilton tried to argue that the two letters it submitted before its 10 December 1997, claim were claims; however, Hamilton did not certify either letter. Therefore, the COFC held that neither letter constituted a claim. *Id.*

October 1997 letter served as a "constructive denial" of Hamilton's 10 December 1997 claim and vested the COFC with jurisdiction.[751]

Bonneville Gets Bounced

On 19 November 1991, Bonneville Associates appealed a government claim for $5.195 million to the GSBCA.[752] Less than two months later, Bonneville withdrew its notice of appeal so that it could pursue its appeal in the Court of Claims (now the COFC).[753] In response, the GSBCA dismissed Bonneville's appeal without prejudice based on Board Rule 28(a)(1).[754]

Shortly before the GSBCA dismissed its appeal, Bonneville sued the GSA in the COFC; however, the COFC dismissed the suit for lack of subject matter jurisdiction. According to the COFC, Bonneville's decision to appeal to the GSBCA first constituted an election of remedies that barred its later suit in the COFC.[755] Bonneville next appealed to the CAFC, which affirmed the COFC's decision.[756] As a result, Bonneville tried unsuccessfully to reinstate its appeal to the GSBCA. The board denied Bonneville's motion because the majority considered Bonneville's reinstated appeal a "new appeal."[757] As such, Bonneville's appeal was untimely because Bonneville failed to file the appeal within ninety days of the date it received the contracting officer's final decision.[758]

Bonneville again appealed to the CAFC, proffering two arguments. First, Bonneville argued that Board Rule 28(a)(2) permitted it to reinstate its appeal any time within three years of the date the GSBCA dismissed it.[759] Second, Bonneville argued that the GSBCA should have equitably tolled the ninety-day CDA time limit[760] based on the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*.[761] The CAFC disagreed.

With respect to Bonneville's first argument, the CAFC found that Bonneville read too much into the language of Board Rule 28(a)(2). According to the court, Board Rule 28(a)(2)

749. *Id.* at 576-79 (relying on *Placeway Constr. Corp. v. United States*, 920 F.2d 903 (Fed. Cir. 1990), while distinguishing *Sharman v. United States*, 2 F.3d 1564 (Fed. Cir. 1993)).

750. *Id.* at 580.

751. *Id.*

752. Bonneville Assocs., Ltd. Partnership v. Barram, 165 F.3d 1360 (Fed. Cir. 1999), *cert. denied*, 1999 U.S. LEXIS 4817 (Oct. 4, 1999). *See generally* Ralph C. Nash, *Selecting the Forum for Disputes: A Catch-22*, 13 THE NASH & CIBINIC REP. NO. 4, at 58 (April 1999).

753. *Bonneville Assocs.*, 165 F.3d at 1362. Bonneville apparently withdrew its notice of appeal because it did not think that the GSBCA had jurisdiction over a contract that primarily involved the procurement of real property. *Id. See* Nash, *supra* note 752, at 58. *See also* 41 U.S.C.A. § 602(a)(1) (West 1999) (stating that the CDA applies to "the procurement of property other than real property in being").

754. *Bonneville Assocs.*, 165 F.3d at 1362. Board Rule 28(a)(1) states:

> Upon motion of the appellant or by stipulation of the parties, the Board may dismiss a case. Unless otherwise stated in the appellant's motion or in the stipulation, the dismissal is without prejudice, except that such dismissal operates as an adjudication upon the merits when requested by an appellant whose case based on or including the same claims has previously been dismissed by the Board.

Id. at 1363. *See* Bonneville Assocs., Ltd. Partnership v. General Servs. Admin., GSBCA No. 11,595, 1992 WL 8165 (G.S.B.C.A. Jan. 17, 1992).

755. *Bonneville Assocs.*, 165 F.3d at 1362. *See* Bonneville Assocs. v. United States, 30 Fed. Cl. 85 (1993).

756. *Bonneville Assocs.*, 165 F.3d at 1362-63. *See* Bonneville Assocs. v. United States, 43 F.3d 649 (1994) (holding that the COFC dismissed Bonneville's suit properly based on the Election Doctrine); *see also* Nash, *supra* note 752, at 58 (noting that both the COFC and the CAFC concluded that the GSBCA had jurisdiction over Bonneville's initial appeal because it was based on a "dual-purpose" contract that included alteration and repair work).

757. *Bonneville Assocs.*, 165 F.3d at 1363. Chairman Daniels dissented, however, stating that the board's position was "built on a legal fiction–that Bonneville never brought this case to [the board] before it filed its motion for reinstatement." *Id.*

758. *Bonneville Assocs.*, 96-1 BCA ¶ 28,122 at 140,390.

759. *Bonneville Assocs.*, 165 F.3d at 1364. Board Rule 28(a)(2) states that:

> When a case has been dismissed without prejudice and has not been reinstated by the Board upon application of any party within three years of the date of dismissal, or within such shorter period as the Board may prescribe, the case shall be deemed to have been dismissed with prejudices as of the expiration of the applicable period.

Id. at 1363.

760. *Id.* at 1365. *See* 41 U.S.C.A. § 606 (West 1999) (stating that "[w]ithin ninety days from the date of receipt of a contracting officer's decision . . . the contractor may appeal such decision to an agency board of contract appeals").

placed an "outer limit" on a contractor's ability to reinstate an appeal–it did not specify the circumstances under which a contractor could reinstate its appeal. Therefore, the GSBCA had to look elsewhere for guidance. The CAFC held that the GSBCA's decision to treat Bonneville's voluntary dismissal the same as the federal courts was neither plainly erroneous nor an abuse of discretion.[762]

With respect to Bonneville's second argument, the CAFC declined to decide whether equitable tolling generally applies to the CDA time limits for appealing a contracting officer's final decision. Instead, the CAFC held that equitable tolling was not appropriate in this case.

To show that equitable tolling is proper, a contractor generally must demonstrate one of two things. The contractor must prove either that it: (1) filed a timely, but defective pleading; or (2) missed the filing deadline because of its adversary's misconduct.[763] Yet, Bonneville could not demonstrate that it missed the statutory deadline because of a "minor technical or inadvertent mistake" in this case.[764] The CAFC found that Bonneville made a conscious decision to withdraw its GSBCA appeal and pursue its case at the COFC. In addition, the CAFC rejected Bonneville's claim that it sought a voluntary dismissal mistakenly rather than a stay, equating it to the type of "garden variety claim of excusable neglect" that the Supreme Court rejected in *Irwin*.[765] As a result, the CAFC concluded that Bonneville could not establish a basis for equitable tolling in this case.[766]

The CAFC Clarifies Meaning of "Fraud"

In *Palmer v. Barram*,[767] the CAFC considered the meaning of the term "fraud" in 41 U.S.C. § 608(d).[768] Palmer argued that the CAFC had jurisdiction over his appeal because the GSA had induced him fraudulently to buy a 1992 Ford Bronco by misrepresenting the condition of the vehicle. The CAFC disagreed.

The question the CAFC addressed was one of first impression. Not finding any cases interpreting the term "fraud" in 41 U.S.C. § 608(d),[769] the CAFC looked to the legislative history of the CDA, as well as the use of similar terms in related or adjacent CDA provisions. The CAFC began its analysis by examining the purpose of the small claims procedures, which was to provide an efficient, cost-effective process for resolving small claims. The CAFC then concluded that allowing a contractor to appeal based on "mere allegations of fraud in the contracting process" would subvert this purpose by making the process longer, slower, more cumbersome, and more costly.[770]

The CAFC next considered whether Congress planned to single out "fraud in the inducement cases" for special treatment. Concluding that it did not, the CAFC noted that "[a]scribing such an intent to Congress . . . would be illogical given other types of similar abuse or inequities that can occur in the contracting process."[771] Finally, the CAFC examined how Congress used similar terms in related or adjacent CDA provisions. In so doing, the CAFC noted that 41 U.S.C. § 609(b) only permits the CAFC to review factual decisions if they are fraudulent, arbitrary, or capricious.[772] As a result, the court concluded that the term "fraud" in 41 U.S.C. § 608(b)

761. *Bonneville Assocs.*, 165 F.3d at 1365 (quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990)). In *Irwin*, the Supreme Court stated that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id*.

762. *Id*. at 1364. If a party seeks a voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a), federal courts normally will consider the proceedings a nullity and leave the parties in the same position they would have been in if no action had ever been brought. *Id.* (quoting Williams v. Clarke, 82 F.3d 270, 273 (8th Cir. 1996)).

763. *Id.* at 1365 (quoting *Irwin*, 498 U.S. at 96).

764. *Id.* at 1366.

765. *Id.* (quoting *Irwin*, 498 U.S. at 96).

766. *Id.* Judge Gajarsa concurred in the court's judgment; however, he wrote separately to address two issues. First, Judge Gajarsa wanted to emphasize that the court did not decide the question of whether the presumption in favor of equitable tolling applies to the CDA. According to Judge Gajarsa, this is still an open question. In addition, Judge Gajarsa wanted to discuss the GSBCA's inability to construe its rules to enlarge its jurisdiction under the CDA. *Id*. at 1366-68 (Garjarsa, J., concurring).

767. No. 97-1539, 1999 U.S. App. LEXIS 18040 (Fed. Cir. Aug. 3, 1999).

768. *Id*. at *10-*21. The CAFC raised this issue *sua sponte*. *Id.* at *8. *See* 41 U.S.C.A. § 608(d) (West 1999) (stating that "[a] decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud").

769. *Id.* at *10. Because this was a case of first impression, the CAFC solicited amicus briefs. *Id*. at *8. However, the CAFC largely ignored the brief submitted by the Federal Circuit Bar Association because it either disagreed with the Bar Association's interpretation of the cited cases or distinguished them. *Id.* at *16-*18.

770. *Id.* at *13.

771. *Id.* at *14. The CAFC specifically mentioned the lack of capacity or authority, duress, illegality, unconscionability, and mistake. *Id.*

applies to fraud in the board proceedings, not fraud in the underlying contract.[773]

Contractor Must Perform Option Pending Outcome of Appeal

In *Alliant Techsystems, Inc. v. United States*,[774] the CAFC addressed a contractor's obligation to perform under the Disputes clause of its contract pending the outcome of its appeal.[775] In *Alliant*, the Army attempted to exercise an option under its contract with Alliant Techsystems, Inc. to demilitarize bombs. Alliant objected.[776] Alliant sent the contracting officer a letter on 11 September 1997 alleging that the Army's attempt to exercise the option was untimely and the specified delivery rate was improper. In response, the contracting officer sent Alliant a letter on 17 September 1997 rejecting Alliant's arguments and demanding that Alliant demilitarize the option quantity at the specified delivery rate.

Alliant sought declaratory relief from the COFC,[777] which the court granted on 31 October 1997.[778] The court held that Alliant had to perform the option, but at a lower delivery rate. As a result, both Alliant and the Army appealed. Alliant appealed the COFC's conclusion that it had to perform the option, and the Army appealed the COFC's conclusion that it had jurisdiction to grant declaratory relief.[779]

The Army proffered four arguments challenging the COFC's jurisdiction. First, the Army argued that the Disputes clause required Alliant "to comply with the contracting officer's directive first and litigate about the directive's propriety later."[780] As a result, the Army argued that Alliant's 11 September 1997 letter was not a claim because Alliant could not seek relief "as a matter of right."[781] Second, the Army argued that the contracting officer's 17 September 1997 letter was not a final decision because the contracting officer did not believe that Alliant had submitted a proper claim.[782] Third, the Army argued that the Tucker Act[783] does not give the COFC jurisdiction over a nonmonetary dispute if the contractor could convert the claim into a monetary claim by simply completing the work. Fourth, the Army argued that "prudential considerations" should have precluded the COFC from exercising jurisdiction in this case.[784]

The CAFC rejected the Army's first argument because the Army misinterpreted the phrase "as a matter of right." According to the CAFC, the phrase merely requires a contractor to "specifically assert entitlement to the relief sought," which Alliant did in its 11 September 1997 letter.[785] Moreover, the Army's interpretation would force the COFC to put the "cart before the horse" by requiring it to decide whether the Army had exercised the option improperly before it could decide whether it had jurisdiction over Alliant's appeal. Finally, the Army's interpretation was contrary to the regulatory definition of a claim. As a result, the CAFC refused to impose the addi-

772. *Id.* at *15. *See* 41 U.S.C.A § 609(b) (West 1999) (stating that "the decision [of the board] on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious . . . .").

773. *Palmer*, 1999 U.S. App. LEXIS 18040, at *15. The CAFC did not decide who has to commit the fraud in the board proceedings. *Id.*

774. 178 F.3d 1260 (Fed. Cir. 1999).

775. *Id.* The disputes clause states: "The contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer." FAR, *supra* note 17, at 52.233-1(i).

776. *Alliant*, 178 F.3d at 1264. The contract included an option clause that allowed the Army to increase the number of bombs to be demilitarized by 100% of the base number, or 24,497 additional bombs. *Id*.

777. *Id.* at 1264. Alliant also sought an injunction; however, the COFC does not have jurisdiction to grant injunctive relief. *Id.*

778. *Id. See* Alliant Techsystems, Global Envtl. Solutions Bus. Div. v. United States, No 97-626C, 1997 U.S. Claims LEXIS 315 (Fed. Cl. Oct. 31, 1997).

779. *Alliant*, 178 F.3d at 1264. The Army also challenged the COFC's decision to decrease the specified delivery rate. *Id*.

780. *Id.* at 1265.

781. *Id. See* FAR, *supra* note 17, at 33.201.

782. *Alliant*, 178 F.3d at 1267. The Army relied primarily on the following language in the contracting officer's 17 September 1997 letter: "If you choose to submit a claim under our contract, I suggest you do so in conformance with the Contract Disputes Act provision, that is, you must certify your claim and I will render a formal Contracting Officer's Final Decision within 60 days." The Army also argued that Alliant's 11 September 1997 letter was not a claim because it was not certified. *Id*. *See* FAR, *supra* note 17, at 33.201.

783. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C.A. §§ 507, 1346, 1402, 1491, 1496, 1497, 1501, 1503, 2071, 2072, 2411, 2501, 2512 (West 1999)).

784. *Alliant*, 178 F.3d at 1270.

785. *Id.* at 1265 (citing Reflectone v. Dalton, 60 F.3d 1576, 1572 (Fed. Cir. 1995); Essex Electro Eng'rs Inc. v. United States, 960 F.2d 1576, 1586-91 (Fed. Cir. 1992)).

tional burden on Alliant of waiting until it had completed the option before it could seek judicial relief.[786]

After rejecting the Army's second argument, the CAFC moved on to the Army's third argument.[787] Here, the CAFC reviewed the legislative history of the Tucker Act, as well as its own precedents. With respect to the legislative history, the court found that Congress did not intend to preclude a contractor from seeking judicial review of a final decision that affects the ongoing performance of a contract. With respect to its own precedents, the CAFC found that the Army's restrictive definition of the term "nonmonetary disputes" was inconsistent with its decision in *Garrett v. General Electric Co*.[788] In fact, the CAFC held that *Garrett* "stands for the proposition that nonmonetary claims are not outside the jurisdiction of the Court of Federal Claims simply because the contractor could convert the claims to monetary claims by doing the requested work and seeking compensation afterwards."[789]

The Equal Access to Justice Act (EAJA)[790]

The CAFC Defines "Agent"; Denies Recovery for Contractor's Principals and Employees

In *Fanning, Phillips and Molnar v. West*,[791] the CAFC considered whether the EAJA required the VA to reimburse Fanning, Phillips and Molnar (FP&M) for the salaries it paid its principal and employees when they were working on its claims.[792] FP&M argued that the EAJA permits it to recover the salary it paid its principal because the term "agent" in 5 U.S.C. §§ 504(a) and (b)(1)(A)[793] includes "non-attorney representatives of a prevailing party."[794] FP&M then argued that the EAJA permits it to recover the salary it paid its other employees because the EAJA permits the prevailing party to recover fees and expenses for "any attorney, agents, expert witnesses, and other litigation support services, whether or not they are employees."[795] The CAFC disagreed.

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786. *Id*. at 1266-67. The CAFC noted that a contractor would still be obligated to continue performing as directed pending a favorable decision from the court. *Id*. (distinguishing Dynamics Corp. of Am. v. United States, 389 F.2d 424 (Ct. Cl. 1968)).

787. *Id*. at 1267-68. The CAFC noted that the contracting officer's belief that Alliant had to submit a certified claim was erroneous. Therefore, the contracting officer's decision was final for jurisdictional purposes because it clearly rejected Alliant's arguments and ordered Alliant to perform. *Id.*

788. *Alliant*, 178 F.3d at 1269-70 (citing Garrett v. General Elec. Co., 987 F.2d 747 (Fed. Cir. 1993)).

789. *Id.* at 1270. The court also rejected the Army's final assertion that "prudential considerations" should have precluded the COFC from exercising jurisdiction in this case. The CAFC opined that the COFC and the agency BCAs could prevent the piecemeal review of routine contract administration matters by limiting the circumstances under which they would grant declaratory relief to: (1) those involving fundamental questions of contract interpretation, and (2) those requiring an early declaration of the parties' rights. *Id*. at 1270-72.

790. 5 U.S.C.A. § 504 (West 1999); 28 U.S.C.A. § 2412 (West 1999). *See* 31 U.S.C.A. § 1304 (West 1999); 41 U.S.C.A. § 607(c) (West 1999).

791. 160 F.3d 717 (Fed. Cir. 1998). FP&M initially filed two applications based on two successful appeals; however, the CAFC dismissed one of the applications because FP&M did not appeal until 82 days after the Veterans Board of Contract Appeals denied the application. *Id.* at 720. *See* 5 U.S.C.A. § 504(c)(2) (requiring a party to file its appeal within 30 days of the date the court makes the EAJA determination).

792. *Fanning*, 160 F.3d at 719. FP&M specifically sought reimbursement of: (1) the hourly wages it paid to employees who worked on the claims, (2) the salary (plus overhead and profit) of Gary Molnar, a partner who worked on the claims, (3) the salary (plus overhead and profit) of the employee who performed clerical and secretarial services for Mr. Molnar, (4) fees paid to outside counsel for legal services, and (5) travel, long distance telephone, and overnight delivery expenses. *Id*.

793. *Id*. at 720. Section 504(a) states that:

> An agency that conducts an adversary adjudication shall award, to the prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding . . . A party seeking an award of fees and other expenses shall . . . submit to the agency an application which shows . . . the amount sought, including an itemized statement *from any attorney, agent or expert witness representing or appearing in behalf of the party* stating the actual time expended and the rate at which fees and other expenses were computed.

5 U.S.C.A. § 504(a) (emphasis added). Section 504(b)(1)(A) then states that:

> The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . *attorney or agent fees* shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.

Id. § 504(b)(1)(A) (emphasis added).

794. *Fanning*, 160 F.3d at 720.

795. *Id.* at 720. *See* 5 U.S.C.A. § 504(a).

The court began its analysis by looking at the language of the statute. Rather than simply looking at the "bare meaning" of the term "agent," however, the court looked at the "purpose and placement [of the term] in the statutory scheme."[796] In so doing, the court concluded that the term "agent" refers to "specialized representatives of litigants."[797] Therefore, FP&M could not recover its principal's salary under the EAJA because he was not a "specialized non-attorney practitioner" whom FP&M hired to prosecute its claim.[798]

Prime Contractor Denied Recovery of Subcontractor's Attorney's Fees on "Pass-Through Claim"

R.C. Construction Co. v. United States[799] is significant for two reasons. First, Judge Bruggink penned one of the more memorable lines of the year when he wrote: "[A]s the court has had occasion to observe in the past, common sense and suits against the sovereign often seem to be only nodding acquaintances."[800] Second, Judge Bruggink held that a prime contractor could not automatically recover its subcontractor's legal fees under the EAJA for a "pass-through claim."[801]

The court relied primarily on the CAFC's interpretation of the term "incurred" in 28 U.S.C. § 2412(d)(1)(A) to resolve the question of whether a prime contractor could recover its subcontractor's legal fees.[802] In *Ed A. Wilson, Inc. v. General Services Administration*, the CAFC held that a prevailing party could recover such fees if: (1) it had an obligation to pay the legal fees, (2) it had an attorney-client relationship with the attorney, or (3) a third party (for example, an insurer) had incurred the legal fees on its behalf. The COFC, however, distinguished *Wilson* and *R.C. Construction*. For example, the COFC found no attorney-client relationship between R.C. Construction Co. and its subcontractor's attorney.[803] In addition, the COFC found no prepaid legal services arrangement between R.C. Construction and its subcontractor. Finally, the COFC found no contractual provision that required R.C. Construction to pay its subcontractor's legal fees. As a result, the COFC held that R.C. Construction could not recover its subcontractor's legal fees under *Wilson* because it did not "incur" them.[804]

SPECIAL TOPICS

Alternative Dispute Resolution (ADR)

The ADR process continues to resemble something akin to University of Alabama football: regardless of the outcome, its fans still scream "Roll Tide Roll." In fact, it is becoming politically incorrect to say you are not a believer in ADR. Republican and Democratic presidential candidates, who we now know are all men "of faith," may soon attempt to exceed each other in their public adoration of ADR.

Air Force Issues New ADR Policy Guidance

The Air Force continues to make ADR a bigger part of how it does business: the aerospace service has issued a comprehensive policy on dispute resolution entitled "ADR First."[805] The policy states that ADR would be the first-choice method of resolving contract disputes if traditional negotiations fail. The ADR First policy represents an affirmative determination to

796. *Fanning*, 160 F.3d at 721.

797. *Id. See* Cook v. Brown, 68 F.3d 447, 451 (Fed. Cir. 1995) (concluding that the services of a non-lawyer employee of the Disable American Veterans were reimbursable "agent fees" under 5 U.S.C. § 504, but not reimbursable attorney's fees under 5 U.S.C. § 2412).

798. *Fanning*, 160 F.3d at 721. *See* Landscaping by Femia Assocs., Inc., VABCA No. 5099E, 99-1 BCA ¶ 30,276 (holding that an accountant firm that submitted an invoice for representational fees lacked standing because it was not: (1) a party to the underlying appeal, or (2) qualified to represent the appellant). The court also examined the legislative history of the EAJA, noting that Congress deleted language that would have compensated prevailing parties for "lost opportunity costs" before it passed the EAJA. Therefore, the court concluded that Congress did not intend to compensate prevailing parties for these costs. *Fanning*, 160 F.3d at 722.

799. 42 Fed. Cl. 57 (1998). *See generally* Ralph C. Nash, *Subcontractor Claims Against the Government: A Fragile Process*, 13 THE NASH & CIBINIC REP. NO. 13, at 52 (April 1999).

800. *R.C. Constr.*, 42 Fed. Cl. at 58.

801. *Id.* at 63. A "pass-through claim" is a subcontractor claim that the prime contractor has agreed to sponsor against the government because of its liability to the subcontractor. *Id.* at 58.

802. *Id.* at 59. Section 2412(d)(1)(A) states that "a court shall award to a prevailing party . . . fees and expenses . . . incurred by that party." 28 U.S.C.A. § 2412(d)(1)(A) (West 1999).

803. *R.C. Constr.*, 42 Fed. Cl. at 58-60 (citing Ed A. Wilson, Inc. v. General Servs. Admin., 126 F.3d 1406 (Fed. Cir. 1997)). The subcontractor's attorney appeared at the trial for the limited purpose of examining witnesses and making arguments. However, the subcontractor's attorney was acting on behalf of the subcontractor–he was not acting on behalf of R.C. Construction. Therefore, the subcontractor's attorney owed his allegiance solely to the subcontractor. *Id.*

804. *Id.* at 60.

805. *ADR: Air Force Launches New ADR Initiative; Drafts Legislation to Fund ADR Settlements*, Fed. Cont. Daily (BNA) (Apr. 28, 1999), *available in* LEXIS, News Library, BNAFCD file [hereinafter *Air Force Launches New ADR Initiative*].

"avoid the disruption and high cost of litigation."[806] The use of ADR to settle the AC-130 Gunship[807] litigation, a dispute that lasted more than ten years and cost the Air Force some $40 million in legal expenses, [808] is representative of both the impetus for and success of ADR.

As part of its overall policy, the Air Force has entered into corporate-level memoranda of agreement (MOAs) with twenty of its largest contractors. These MOAs, signed by the Air Force Principal Deputy Assistant Secretary for Acquisition and Management and each contractor's chief executive officer, agree in broad terms to the use of ADR. When negotiations at the contracting officer level "reach an impasse, the parties 'agree to use to the maximum extent feasible' one or more of the ADR processes contemplated by FAR Part 33.2 to reduce or eliminate the need for litigation."[809] A second policy initiative directs all Air Force major weapon system program managers "to spell out in more specific terms how they will use ADR to avoid disputes at the program level."[810] Such agreements would apply to the service's forty largest programs and approximately sixty-five to seventy percent of the agency's total procurement dollars.[811]

Partial Use of ADR is Partially Rewarding

In *TRW, Inc.*,[812] the Army issued a request for proposals for linguist services. After receiving its debriefing as an unsuccessful offeror, TRW protested various aspects of the technical evaluation of proposals. After the agency disclosed its price evaluation methodology, TRW filed a second protest claiming that the Army had failed to consider price as a significant evaluation factor, contrary to both the CICA and the solicitation. The GAO then held an "outcome prediction" ADR conference[813] regarding only TRW's supplemental protest.[814] At the ADR conference, the GAO attorney expressed her view that the protest was likely to be sustained. Subsequently, the Army offered to take corrective action, and the GAO dismissed both TRW protests as academic.[815] The Army then agreed to pay TRW's costs of filing and pursuing the supplemental, but not the original, protest.

The GAO decided that TRW was not entitled to its costs for the initial protest. A protestor generally receives reimbursement for "the costs incurred with respect to all issues pursued, and not merely those upon which it prevails."[816] The GAO, however, will limit such recovery when a losing protest issue is so clearly severable as to constitute a separate protest.[817] In this

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806. *Id.* Prior to the "ADR First" policy, the Air Force spent approximately $18 million annually in litigation costs. *Claims: Air Force, Boeing Settle 10-year-old Gunship Dispute For $295M Using ADR*, Fed. Cont. Daily (BNA) (Dec. 15, 1998), *available in* LEXIS, News Library, BNAFCD file [hereinafter *Air Force, Boeing Settle 10-year-old Gunship Dispute*]. The Air Force also pays contractors between $30 million and $40 million annually just to photocopy paperwork for litigation purposes. *Air Force Launches New ADR Initiative*, *supra* note 805.

807. The AC-130H Spectre gunship is a heavily armed aircraft whose side-firing weapons provide tremendous firepower in support of ground forces. DEP'T OF AIR FORCE, *USAF Fact Sheet 95-25* (19 Oct. 1999) (visited Nov. 14, 1999) <http://www.af.mil/news/factsheets/AC_130H_Spectre.html>.

808. *Air Force, Boeing Settle 10-year-old Gunship Dispute*, *supra* note 806.

809. *Air Force Launches New ADR Initiative*, *supra* note 805.

810. George Cahlink, *U.S. Air Force Pursues Contractor Mediation*, DEF. NEWS, Aug. 2, 1999, at 18. These agreements would individually set forth how long a dispute may go on, or what dollar threshold must be crossed, before going to ADR.

811. *ADR: Air Force Launches New ADR Initiative*, *supra* note 805.

812. B-282459.3, 1999 U.S. Comp. Gen. LEXIS 135 (Aug. 4, 1999).

813. A GAO outcome prediction ADR conference involves use of a GAO staff attorney who advises the parties as to the perceived merits of the protest in light of the case facts and prior GAO decisions. *Id.* at *3. The GAO uses these conferences when the protest appears to be clearly meritorious on its face. *Id.* at *2-*3.

814. Here, the GAO outcome prediction ADR conference did not discuss technical evaluation issues. "[U]nlike the price evaluation issues, these issues did not fit squarely within established precedent . . . [Also] it was anticipated that corrective action taken with regard to the price evaluation issue would render the technical evaluation issues academic." *Id.* at *3.

815. *Id.* at *4. The GAO stated:

> In dismissing TRW's initial protest as academic, our Office denied the Army's request to issue a separate decision resolving the technical evaluation issues before the agency performed a new price/technical trade-off. While we acknowledged the possibility that TRW might protest the same technical evaluation issues if the agency ultimately confirmed [the successful offeror's] award, we stated that we would not resolve the technical evaluation issues prior to the agency's corrective action.

Id. at *4-*5.

816. *Id.* at *6.

817. *Id.*

case, the GAO stated that TRW's two protests were clearly severable, sharing none of the same facts and legal theories. The fact that TRW's initial protest was not susceptible to the outcome-prediction ADR conference supported implicitly the GAO's determination as to the protests' divisibility regarding the award of costs.

The case is significant because it highlights a present shortcoming of the GAO outcome-prediction ADR process. In this ADR procedure, the GAO attorney may be able to address an issue where the result is very apparent, but will not be able to opine on an issue that is a closer call. A party armed with a limited prediction may elect to take some affirmative action (such as, withdraw its protest or correct the identified deficiency), or it may decline to do so in order to obtain a comprehensive written decision.[818] Further, a written decision that addresses all issues undoubtedly would alter GAO's analysis as to issue severability and, therefore, the protestor's recovery of costs.

New Regulations on ADR

Effective 29 December 1998, Federal Acquisition Circular 97-09[819] amended the FAR to implement fully the Administrative Dispute Resolution Act of 1996.[820] Specifically, the rule: (1) authorizes an exception to full and open competition for the purpose of contracting with a "neutral person" for the resolution of "any current or anticipated litigation or dispute,"[821] (2) conforms ADRA's claim certification requirements to the requirements under the Contract Disputes Act,[822] (3) exempts certain communications relative to ADR from the Freedom of Information Act (FOIA),[823] and (4) requires both contractors and the government to provide written explanations for rejecting ADR procedures.[824]

Increased Use of ADR for Contract Appeals

The ASBCA has continued its aggressive use of ADR services in contract appeals litigation. In FY 1999, the ASBCA provided ADR services to the parties on sixty-eight occasions.[825] This represented a ten-percent increase over the sixty-two requests made during FY 1998, and a ninety-four-percent increase over the thirty-five requests made during FY 1997. Of the sixty-eight requests, thirty-one were for binding ADR, while the remaining thirty-eight were for nonbinding ADR.[826] The sixty-eight requests covered a total of 112 appeals and eleven pre-appeal disputes.[827] Over the past five years, the ASBCA has handled some 200 ADR requests.[828]

Bankruptcy

My Claim Is Your Claim

May a contractor that has filed for liquidation in the U.S. Bankruptcy Court transfer its equitable adjustment claim against the government to a another company that later purchases and transfers to itself all of the bankrupt's assets? Additionally, does that purchase and transfer create privity of contract between the new company and the government, establishing standing for the new company to pursue the transferred claim against the government? Confused? Judge John Lane of the ASBCA took all these issues and rolled them into one holding in the appeal of *Certified Abatement Technologies, Inc.*[829]

818. The GAO acknowledged that had the Army declined to take corrective action, the written decision "would presumably have addressed both price evaluation and technical evaluation issues." *Id.* at *5.

819. 63 Fed. Reg. 58,586 (Final Rules) (1998).

820. Pub. L. No. 104-320, 110 Stat. 3870 (amending 5 U.S.C.A. §§ 571-584 (West 1999)).

821. FAR, *supra* note 17, at 6.302-3(a)(2)(iii).

822. A contractor need not certify its claim regardless of its amount as a condition of the federal agency agreeing to use ADR. Now, only claims that exceed the CDA threshold of $100,000 must be certified. FAR, *supra* note 17, at 33.207(a), 52.233-1(d).

823. 5 U.S.C.A. § 552(b)(3); FAR, *supra* note 17, at 24.202(c), 33.214(e).

824. FAR, *supra* note 17, at 33.214(b).

825. Memorandum, Chairman, Armed Services Board of Contract Services, to Secretary of Defense, subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 1999 (1 Oct. 1999) [hereinafter ASBCA Chairman Memorandum]. The cases ranged in amount from several thousand dollars to millions of dollars. *Id.*

826. *Id.* In FY 1998, there were 25 requests for binding ADR and 37 requests for nonbinding ADR. *ASBCA Appeals Continue to Decline in FY 1998*, 40 THE GOV'T CONTRACTOR NO. 42 (4 Nov. 1998) [hereinafter *ASBCA Appeals*].

827. ASBCA Chairman Memorandum, *supra* note 825. On limited occasions, the ASBCA provided ADR services to the disputing parties even before the issuance of a final decision. Telephone Interview with David Houpe, Legal Advisor, Armed Services Board of Contract Appeals (Nov. 4, 1999). By comparison, in FY 1998 the 62 ADR requests covered 81 appeals and 9 pre-appeal disputes. *ASBCA Appeals*, *supra* note 827.

828. Cahlink, *supra* note 810, at 18.

This confusing tale begins with Certified Abatement Technologies filing for bankruptcy under Chapter 11 of the Bankruptcy Code.[830] After Certified's bankruptcy filing, Profit from Computing, Inc. (PFC) offered to buy Certified's assets and have the assets transferred to PFC.[831] The Bankruptcy Court issued its order confirming Certified's liquidation plan, including the purchase and transfer of the equitable adjustment claim to PFC.[832] After it purchased and transferred the claim, PFC attempted to substitute itself for Certified before the ASBCA.[833] The government objected and moved for dismissal for lack of standing.[834]

The board held that an agreement existed between PFC and Certified, that all conditions to the agreement were satisfied, and that the agreement was valid under state and federal law.[835] Furthermore, the board held that the Assignment of Claims Act did not bar the transfer of the claim.[836] The board found also that PFC did have the privity required to pursue the claim against the government. The board held that the assignment of a claim by operation of law, such as was the case here, creates privity and standing without a further showing of a "relationship to the performance of the contract."[837] Therefore, the board permitted PFC to be substituted for Certified in prosecuting the claim against the government, and denied the government's motion to dismiss for lack of standing.

Buy American Act (BAA)[838]

In *ATA Defense Industries, Inc.*,[839] the GAO declined to review the Army's decision to waive BAA preferences in a procurement for live-fire training ranges. In *ATA*, the Army issued a RFP for the Intermediate New Generation Army Targetry System (INGATS).[840] The RFP incorporated by reference the DFARS section[841] implementing the BAA. This provision required the agency to add an evaluation differential to offers of

829. ASBCA No. 39852, 99-1 BCA ¶ 30,389. Actually, this case began in 1987, and continued into 1989, when Certified, while performing a requirements contract for the Department of the Navy, filed a request for equitable adjustment with the agency in the amount of $206,036. *Id.* at 150,196. After the government rejected the equitable adjustment, Certified certified its claim and the contracting officer rendered a final decision, denying the claim. *Id.* On 16 November 1989, Certified filed its appeal timely before the bard. In 1993, Certified filed for bankruptcy. At the time of its bankruptcy filing, Certified was in good standing in Delaware, the state of its incorporation. *Id.*

830. 11 U.S.C.A. §§ 1101-1174 (West 1999).

831. *Certified Abatement Techs., Inc.*, 99-1 BCA ¶ 30,389 at 150,197. The sole shareholder and president of PFC was also the sole shareholder and president of Certified. As Certified's president, he accepted PFC's offer "subject to the approval of the . . . Bankruptcy Court." *Id.* Certified's president listed the equitable adjustment claim on the Disclosure Statement filed before the Bankruptcy Court. The claim's value was estimated at $125,000. *Id.*

832. *Id.* at 150,198.

833. *Id.* The president of PFC submitted a letter to the board that advised that PFC had acquired Certified's assets and liabilities through the bankruptcy process. The letter advised further that PFC intended to pursue the claim and requested through the board that Certified's counsel continue to represent PFC on this claim. *Id.*

834. *Id.* The government argued that no valid sale of the claim existed between PFC and Certified. Furthermore, if there was a sale, it was invalid under both state and federal law. In the alternative, the government argued that even if the sale was valid, PFC lacked privity of contract and as such lacked standing because it was not involved with contract performance. *Id.*

835. *Id.* The agreement between PFC and Certified included confirmation by the Bankruptcy Court and approval of the purchase and transfer of assets and liabilities by the Internal Revenue Service (IRS) and the State of New Jersey. All of these conditions were met and the Bankruptcy Court issued its order confirming the transaction and neither the IRS nor New Jersey objected to the sale, and in fact approved the sale. *Id.* The government maintained that the sale was invalid because at the time of the agreement between Certified and PFC, and at the time of the Bankruptcy Court's order confirming the purchase and transfer, Certified's charter with the State of Delaware was void for failing to pay franchise taxes. *Id.* at 150,199. The board determined that the government's argument was erroneous as Delaware law allows a company up to three years to dispose of its assets and liabilities once its charter is revoked. *Id.* at 150,200.

836. *Id.* The board discussed the Assignment of Claims Act, 31 U.S.C.A. § 3727 (West 1999), stating that the Act prohibits the voluntary transfer or assignment of any claim against the government, with limited exceptions that are inapplicable to the present case. *Id.* The board went on to discuss that the Act does not bar transfer of claims relating to government contracts incident to bankruptcy proceedings. The board found that these transfers occur by operation of law and therefore fall outside the prohibitions of the Act. *Id.* The government maintained that the transfer was not incident to Certified's bankruptcy proceeding, but was part of voluntary sale of assets to PFC. The government argued that the Bankruptcy Court did not order the sale nor did the Bankruptcy Court accomplish the sale. *Id.* The board disagreed, stating that Certified's liquidation plan included the pre-plan agreement of sale and was approved by the Bankruptcy Court. *Id.*

837. *Id.* at 150,201. The board held that the assignment of a claim alone creates privity and standing of the assignee for the "limited purpose of pursuing an assigned claim." *Id.*

838. 41 U.S.C.A. §§ 10a-10d (West 1999). The BAA establishes a preference for buying domestic "articles, materials, and supplies" when they are purchased for use in the United States. The BAA was a depression-era statute designed to protect American capital and jobs.

839. B-282511, 1999 U.S. Comp. Gen. LEXIS 131 (July 21, 1999).

840. The INGATS procurement called for the installation of live-fire training ranges at various Army facilities throughout the world. The major systems and subsystems assembled into the training ranges include stationary infantry targets, moving infantry targets, stationary and moving armor targets, hit detector devices, and simulators for sound and battle-effects. *ATA*, 1999 U.S. Comp. Gen. LEXIS 131, at *2.

foreign end products because offers of domestic end products also had been proposed.[842] After evaluating all proposals, the Army awarded the contract to Caswell International Corporation. In its offer, Caswell included a "non-contact hit detection device (HDD)"[843] manufactured in Switzerland. The protester, ATA, claimed Caswell's non-contact HDD was a foreign end item that required the Army to apply the fifty-percent price differential to the evaluation. Although the Army denied that Caswell's device was a foreign end item, it requested and received a secretariat-level exemption from applying the BAA to the INGATS procurement.[844]

The GAO declined to review this basis of ATA's protest.[845] Specifically, the GAO noted that it would not disturb an agency's decision to waive the BAA, regardless of whether the waiver occurred during the procurement or after contract award. In this decision, the GAO affirmed its stance that it will defer to the agency head who is responsible for balancing the BAA against foreign policies to determine what is in the public interest.

Competitive Sourcing and Service Contracting

Competitive Sourcing

The GAO: A Flurry of Guidance

During 1999, the GAO issued several opinions[846] analyzing the DOD's cost studies under Office of Management and Budget (OMB) Circular A-76.[847] Two decisions highlight important issues stemming from OMB Circular A-76 cost studies.

When is a Conflict a Conflict?

In *DZS/Baker LLC*,[848] the GAO sustained a protest filed by two offerors in connection with an Air Force OMB Circular A-76 cost study. In *Baker*, the Air Force issued an A-76 solicitation for civil operations and maintenance services at Wright-Patterson Air Force Base. The Air Force canceled the solicitation and continued in-house performance of the services after finding the technical proposals from the private offerors unacceptable.[849] Two offerors, DZS/Baker and Morrison Knudsen, protested the Air Force's decision, arguing that fourteen of the sixteen agency evaluators who reviewed the technical proposals held positions that would have been contracted out under the solicitation.

The GAO agreed, finding the evaluation process "fundamentally flawed as a result of a conflict of interest."[850] In its decision, the GAO focused on various FAR provisions dealing with conflicts of interest. It cited initially FAR 3.101-1, which enunciates the "impeccable standard of conduct" that applies to government business, requiring agency employees to avoid even the appearance of a conflict of interest.[851] The GAO noted, however, that FAR subpart 3.1 does not address scenarios when agency employees may be unable to render impartial advice to the government. Thus, the GAO turned its attention

841. DFARS, *supra* note 190, at 252.225-7001. This provision states, in part: "Generally, when the Buy American Act is applicable, each nonqualifying country offer is adjusted for the purpose of evaluation by adding 50 percent of the offer, inclusive of duty." *Id*. at 252.225-7001(d).

842. The differential included in the RFP applied to nonqualifying country end products and equaled 50% of the offered price, inclusive of duty. *ATA*, 1999 U.S. Comp. Gen. LEXIS 131, at *6.

843. A "non-contact HDD" is a sophisticated device that measures the acoustic waves or "footprints" a projectile makes as it passes through a target. *Id*. at *10.

844. 41 U.S.C.A. § 10a (West 1999). The BAA permits the head of a procuring agency to waive application of the Act if its application would be inconsistent with the public interest.

845. The GAO sustained the protest on other grounds, finding that the Army evaluated Caswell's proposal improperly on technical criteria. *ATA*, 1999 U.S. Comp. Gen. LEXIS 131, at *32.

846. *See, e.g.*, RTS Travel Serv., B-283055, 1999 U.S. Comp. Gen. LEXIS 162 (Sept. 23, 1999) (finding the agency adjusted properly the contractor's price for contract administration costs to reflect the addition of a full-time equivalent quality assurance evaluator); BMAR & Assoc., B-281664, Mar. 18, 1999, 99-1 CPD ¶ 62 (finding the requirement to submit a lump sum bid in a OMB Cir. A-76 proposal imposed an unwarranted risk to the offeror and an unfair advantage to the in-house offer); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison even though the agency failed to seal the government's management plan and most efficient organization); Gemini Indus., Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (finding the agency acted properly when it evaluated proposals against its estimate of proposed staffing); Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (finding that offerors who participate in the private sector competition, but not selected for comparison with the in-house offer, are entitled to a post-award debriefing).

847. Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities (Aug. 4, 1983) [hereinafter OMB Cir. A-76].

848. B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19.

849. *Id.* at 2.

850. *Id.* at 3.

851. FAR, *supra* note 17, at 3.101-1. This provision states: "Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships." *Id*.

to the organizational conflict of interest provisions of FAR subpart 9.5.

Relying on several provisions of FAR subpart 9.5,[852] the GAO found it "self evident" that the agency evaluators in this case were potentially unable to render impartial advice to the contracting officer.[853] In fact, the GAO noted the agency evaluators were in effect evaluating a competitor's proposal. In light of the "significant conflict of interest," the GAO concluded that the contracting officer failed to take appropriate remedial action and thus sustained the protest.[854]

In its analysis, the GAO did not refer to the financial conflict of interest provisions of 18 U.S.C.A. § 208.[855] That statute prohibits employees from participating in a particular matter if the participation would have a direct and predictable effect on their financial interests. The Office of Government Ethics (OGE) implementing regulations, however, exempt employees from the conflict of interest in limited situations.[856] In September 1999, the Director of the OGE issued a memorandum criticizing the GAO's opinion in *Baker* for failing to analyze 18 U.S.C.A. § 208 and the OGE exemptions.[857] In its memorandum, the OGE disagreed with the GAO's analysis, and noted that it has exempted employees who evaluate bids or proposals in an OMB Circular A-76 cost study from the ambit of 18 U.S.C.A. § 208.[858] Moreover, the OGE reminded readers that such an exemption means that the employee's participation in the matter outweighs any concerns a reasonable person may have about the integrity of the process.[859] Stay tuned for more on this issue.

Best Value in OMB Circular A-76 Cost Studies

In *NWT, Inc.*; *PharmChem Laboratories, Inc.*,[860] the GAO denied protests filed by both NWT, a disappointed offeror, and PharmChem, the offeror whose proposal the Army selected for comparison with the in-house estimate for drug testing at Tripler Army Medical Center. The Army concluded that bringing the drug testing in-house represented the best value for the government. The GAO denied the protests and issued its first decision addressing the use of best value contracting in the OMB Circular A-76 process.[861]

The incumbent, NWT, complained that the Army initiated the cost study without first finding that NWT's performance as the incumbent was either inadequate or too expensive. Additionally, NWT argued that the Army was prohibited by statute

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852. The GAO cited FAR 9.501(d), which finds a conflict of interest when, "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired." FAR, *supra* note 17, at 9.501(d). The GAO also relied on another FAR provision that prohibits a contractor from evaluating its own products or services, or those of a competitor, without proper safeguards to protect the government's interests. *Id.* at 9.505-3. It analogized the 16 agency evaluators to contractors who may lack objectivity when evaluating a competitor's proposal. *Baker*, 99-1 CPD ¶ 19 at 5. Finally, the GAO observed that FAR 9.504 vested contracting officers with the duty to identify and mitigate potential organizational conflicts of interest. *Id.*

853. *Baker*, 99-1 CPD at 5.

854. *Id.* at 7. The Air Force argued that it took precautions to mitigate the conflict of interest. For example, the Air Force stated it segregated the evaluators from the other team members, appointed a procurement analyst whose position was not subject to the OMB Cir. A-76 cost study as the technical evaluation team chief, and increased training and surveillance of the cost study. Unpersuaded, the GAO concluded that these steps were insufficient to eliminate or mitigate the conflict of interest. *Id.* at 6. Moreover, the GAO dismissed the contracting officer's claim that no one but the 16 employees could perform the technical evaluations, finding it "implausible that there were no other personnel available in the Department of the Air Force who were qualified to evaluate proposals for installation civil operations and maintenance services." *Id.* On resolicitation, the government group performing these functions won the cost study. *See* Leroy H. Armes, *Contracting Out: Government Apparent Winner of Contract for Wright-Patterson Engineering Support*, Fed. Cont. Daily (BNA) (Oct. 5, 1999), *available in* LEXIS, News Library, BNAFCD file.

855. 18 U.S.C.A. § 208 (West 1999).

856. 5 C.F.R. § 2640.203(d) (1999). This section exempts employees from the financial conflict of interest when the disqualifying financial interest arises from federal employment. Thus, the exemption permits an employee to make determinations affecting an entire office or group of employees, even though the employee is a member of that group. The employee may not, however, make determinations that would affect only his own salary and benefits. *Id.*

857. Memorandum, Director, Office of Government Ethics, to Designated Agency Ethics Officials, subject: Section 208 Exemptions for Disqualifying Financial Interests that are Implicated by Participation in OMB Circular A-76 Procedures (9 Sept. 1999), *available at* <http://www.usoge.gov/daeogram/1999> [hereinafter Section 208 Memorandum].

858. *Id.* at 1-2 (citing 5 C.F.R. § 2640.203(d) (1999)).

859. Section 208 Memorandum, *supra* note 857, at 2 (citing 5 C.F.R. § 2635.501 (1999)). The GAO responded to the OGE on 19 November 1999. In its response, the GAO affirmed its prior stance that a conflict of interest existed in the Baker case. *See* Memorandum, General Counsel, General Accounting Office, to Honorable Stephen D. Potts (19 Nov. 1999), *available at* <http://www.gao.gov>.

860. B-280988; B-280988.2, Dec. 17, 1999, 98-2 CPD ¶ 158.

861. FAR, *supra* note 17, at 2.101. This section defines "best value" as "the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement." *Id.* To help agencies select the offer with the greatest overall value, the FAR creates a best value continuum.

from using non-cost factors to select a private proposal.[862] The GAO rejected NWT's protest as untimely, reasoning that NWT was objecting to defects in the solicitation. The GAO reminded NWT that offerors must file protests challenging the solicitation before the time set for receipt of the initial proposals.[863] Moreover, the GAO ruled that the Army selected properly PharmChem's proposal for comparison with the in-house estimate. Thus, NWT lacked standing to protest the procedures the Army used to develop the in-house estimate and compare it to PharmChem's proposal.[864]

During the solicitation process, the Army selected PharmChem, the best value offeror, to compete with the in-house offer.[865] PharmChem protested after the Army decided ultimately that the in-house estimate represented a better value for the government. Specifically, PharmChem alleged that the Army failed to adjust the in-house estimate to ensure that it offered the same level of performance as PharmChem's proposal. PharmChem further argued that the cost comparison was flawed. The record before the GAO contained little evidence showing how the Army compared the two performance levels. As a result, the GAO accepted the contracting officer's post-protest hearing testimony offered to the GAO in her testimony at the hearing. The contracting officer stated that both she and the technical evaluation panel found that the in-house proposal met or exceeded the requirements of the solicitation and was, in some areas, superior to PharmChem's proposal. Thus, the contracting officer argued that there was no need to adjust the in-house estimate to bring it on par with PharmChem's proposal. The GAO reasoned that the contracting officer rendered an informed decision that the in-house proposal offered a better value and higher level of performance than PharmChem.[866]

The *NWT* decision offers two key lessons. First, the GAO concluded that the use of best value in cost studies is consistent with the mandate that cost governs the decision to perform the services in-house or by contract. Second, the GAO hinted that it would afford contracting officers wide discretion when comparing the in-house estimate to the best value offers. Some commentators predict that an important issue for the GAO in future cases is defining what level of discretion contracting officers will have to adjust in-house offers found inferior to the best value offer.[867]

The Federal Courts: Another Avenue for Relief?

As the DOD continues its downsizing craze, federal employees continue to seek relief when the government transfers work to the private sector. Increasingly, these employees are petitioning the federal courts for relief. In 1999, the Sixth and Seventh Circuit Courts of Appeal heard cases from employees crying "foul" in the aftermath of the DOD transferring work to contractors. As the saying goes, "you win some, and you lose some."

In *AFGE v. Cohen*,[868] the Seventh Circuit Court of Appeals held that employees at Rock Island Army Arsenal had standing to challenge the Army's decision to contract out weapons production work to private contractors under the Arsenal Act.[869]

862. 10 U.S.C.A. § 2462 (West 1999). This statute states in part:

> Except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel) from a source in the private sector if such a source can provide such a supply or service to the Department at a cost that is lower (after including any cost differential required by law, Executive order, or regulation) than the cost at which the Department can provide the same supply or service.

Id.

863. *NWT*, 98-2 CPD ¶ 158 at 6 (citing 4 C.F.R. § 21.2(a)(1) (1998)).

864. *Id.* at 13-14.

865. In 1996, OMB amended its guidance to allow for best value contracting in a cost study. *See* FEDERAL OFFICE OF MANAGEMENT AND BUDGET OMB CIR. A-76 SUPPLEMENT, PERFORMANCE OF COMMERCIAL ACTIVITIES (Mar. 1996).

866. *NWT*, 98-2 CPD ¶ 158 at 17-18.

867. *GAO Says Agencies Can Determine When In-House Alternative Beats "Best Value" Proposal in A-76 Procurements*, 41 THE GOV'T CONTRACTOR NO. 3, at 5 (Jan. 20, 1999).

868. 171 F.3d 460 (7th Cir. 1999).

869. 10 U.S.C.A. § 4532 (West 1999). Congress passed the Arsenal Act to preserve government in-house military production facilities. This statute states:

> The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis.
> The Secretary may abolish any United States arsenal that he considers unnecessary.

Id.

The court opined that the employees met the standing requirements to challenge an agency action under the APA[870] because they suffered a concrete injury (lost job opportunities) stemming from the Army's contracting procedures. Moreover, the court noted that the employees fell within the "zone of interests" to gain standing under the Arsenal Act. According to the court, Congress passed the Arsenal Act to maintain a ready industrial base in time of national emergency. Thus, the court reasoned that the "link between maintaining a ready workforce and preserving federal jobs is unmistakable."[871]

Conversely, in *AFGE v. Clinton*,[872] the Sixth Circuit Court of Appeals held that employees and their union did not have standing to challenge the procedures by which the Air Force transferred workload at closing bases to private contractors. The employees argued that the Air Force harmed employment prospects when it failed to transfer the workload at closing bases to other bases (where the employees worked) or at least to give those bases a chance to compete for the work. The court dismissed these arguments as "too speculative" to show that the possible loss of work could be traced to the Air Force's contracting procedures.[873] The court noted that even if the Air Force had opened up the workload to the other bases, they could choose not to compete for the work, or, if they did compete, they could lose the work to the private sector. Thus, the court declined to find the employees had standing, and affirmed the lower court.

The Federal Activities Inventory Reform (FAIR) Act: An Update

Last year, Congress passed the FAIR Act.[874] This statute directed executive branch agencies to comply with various requirements. For example, agencies must prepare annually a list of noninherently governmental functions performed by federal employees, submit the list to OMB for review, and then make the list available to the public.[875] The FAIR Act establishes an appeal process for "interested parties" within the agency and the private sector to challenge the contents of the list.[876] The FAIR Act also codifies the definition of "inherently governmental function"[877] and requires agencies to conduct "fair and reasonable cost comparisons."[878]

When it passed the FAIR Act, Congress directed the OMB to issue implementing guidance. On 24 June 1999, the OMB issued its final guidance by inserting the key provisions of the FAIR Act into OMB Circular A-76 and its Supplement.[879] While awaiting the OMB guidance, however, agencies struggled to prepare their lists for OMB review. For the most part, agencies did not meet the 30 June 1999 deadline, citing the sheer magnitude of scrubbing their functions for review.[880] The OMB has released the names of agencies that have to date published their lists.[881] Undoubtedly, agencies will experience growing pains as they compile and then face the inevitable challenges to their lists.

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870. 5 U.S.C.A. § 702 (West 1999).

871. *Cohen*, 171 F.3d at 474.

872. 180 F.3d 727 (6th Cir. 1999).

873. *Id.* at 731-32.

874. Pub. L. No. 105-270, 112 Stat. 2382 (codified at 31 U.S.C.A. § 501 (West 1999).

875. *Id.* Agencies must submit their lists to OMB by the end of the third quarter of the fiscal year. After OMB review, the agency must send the list to Congress and make it available to the public. The OMB will publish a notice in the Federal Register that the list is publicly available.

876. The FAIR Act defines an "interested party" as follows:

> (1) A private sector source that–
> (A) is an actual or prospective offeror for any contract, or other form of agreement, to perform the activity; and
> (B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.
> (2) A representative of any business or professional association that includes in its membership private sector sources referred to in paragraph (1).
> (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.
> (4) The head of any labor organization referred to in section 7103(a)(4) of title 5, United States Code, that includes within its membership officers or employees of an organization referred to in paragraph (3).

Pub. L. No. 105-270, 112 Stat. 2382, 2383.

877. *Id.* at 2384-85.

878. *Id.* at 2383.

879. 64 Fed. Reg. 33,927 (1999). The OMB issued its guidance six days before agencies were required to turn in their lists to the OMB for review.

880. Leroy H. Armes, *Contracting Out: OMB Plans to Make Agency Lists of Activities Available in Installments*, Fed. Cont. Daily (BNA) (Sept. 10, 1999), *available in* LEXIS, News Library, BNAFCD File. To access agency lists available currently, see <http://www.govexec.som/fairact>.

The GAO Says the DOD Makes the "Grade"

In 1999, the GAO evaluated the DOD's competitive sourcing efforts and issued a "report card" of sorts. In one noteworthy report, the GAO reviewed completed cost studies between October 1995 and March 1998 with cost studies completed before 1995.[882] The GAO reported several key findings. First, it found that the private sector won sixty percent of the cost studies, compared to about fifty percent before 1995.[883] Of the fifty-three competitions, forty-three involved single functions, such as grounds maintenance, and ten involved multiple functions, such as base operating support contracts. The GAO also applauded the DOD for completing the cost studies within the established time frames. The average completion time was eighteen months for the single functions and thirty months for the multiple functions.[884]

The GAO questioned, however, the DOD's projected savings of $528 million from the fifty-three completed cost studies. Although the GAO agreed that the data from the completed cost studies showed promising results, it concluded that the data was too limited to analyze any trends.[885] For the GAO, this raised two significant issues. First, the GAO criticized the services for tracking and calculating projected savings inconsistently. Specifically, the services had estimated savings at the time of award. In some of the cost studies the GAO reviewed, however, the services had to change the PWS, thus skewing the initial baseline estimates.[886] Second, the GAO noted that the fifty-three cost studies had been completed for an average of fifteen months or less. From this statistic, the GAO concluded that initial estimates could diminish if the winner failed to perform successfully the function for the entire award period.[887] The GAO recommended that the Secretary of Defense increase oversight of the services' cost studies and projected cost estimates resulting from those studies.[888]

Service Contracting:
The GAO Issues an "Encore" for Service Contracts

In *Encore Management, Inc.*,[889] the agency awarded a contract for clerical and administrative support to a new contractor. The incumbent contractor, Encore, protested the award to the GAO. In response to the protest, the agency proposed to take corrective action, which included reopening discussions and issuing a new decision based on revised proposals. The GAO dismissed this protest.

While proceeding with the corrective action, the agency's inspector general (IG) conducted an audit that found the agency administered the clerical contract as a personal services contract, in violation of the FAR.[890] The IG recommended the agency cease using the contract. In response, the contracting officer canceled the RFP after deciding that the agency would

881. *See* 64 Fed. Reg. 52,809 (1999) (providing notice of the first 52 agencies to have their published lists); 64 Fed. Reg. 58,641 (1999) (providing notice that NASA and the Department of Energy have published their lists). *See also* GENERAL ACCOUNTING OFFICE, COMPETITIVE CONTRACTING: PRELIMINARY ISSUES REGARDING FAIR ACT IMPLEMENTATION, GAO/T-GGD-00-34 (Oct. 28, 1999) (raising issues about how agencies compiled their lists).

882. GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: RESULTS OF RECENT COMPETITIONS, REP. NO. GAO/NSIAD-99-44 (Feb. 23, 1999) [hereinafter RESULTS OF RECENT COMPETITIONS].

883. *Id.* at 7. The 53 competitions the GAO reviewed involved 5757 positions: 3226 military and 2531 civilian. The Air Force conducted a majority of the completed cost studies (85%), but the GAO noted that the DOD pursued aggressively the cost studies since 1995. *Id*. at 5.

884. *Id*. at 9. Prior to 1995, the DOD averaged 51 months to complete all studies. *Id.* The GAO also reported each service's average time for completing its cost studies. For example, the Army and Navy each completed 3 cost studies, all involving single functions. The Army averaged 11 months to complete its cost studies; the Navy averaged 19 months. The Air Force completed 36 single function studies in an average of 18 months, and completed 5 multiple functions in 27 months. *Id*.

885. *Id*. at 10. The GAO noted that the completed cost studies showed that the competitive sourcing process could produce savings, especially when reducing personnel. In fact, the GAO observed that the impact of reducing personnel is most visible when the in-house organizations win the cost study. The number of positions eliminated represents the actual reduction in personnel required to perform the function. *Id*. at 11.

886. *Id*. at 12. The GAO stated that the DOD and the services have been lax in tracking and revising cost changes occurring over time. In particular, the GAO observed that writing a complete, accurate PWS has been a historic problem for the services. It opined that continually adjusting PWS's often resulted in overstating estimated savings in the cost studies. Often, the faulty work statement failed to capture the scope of work, leading to a complete rewrite before award or substantially modifying the work statement after award. *Id*. at 12-13. In a later report, the GAO reviewed the DOD's efforts to improve the quality of its PWS's. GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: LESSONS LEARNED COULD ENHANCE A-76 STUDY PROCESS, REP. NO. GAO/NSIAD-99-152 (July 21, 1999).

887. RESULTS OF RECENT COMPETITIONS, *supra* note 882, at 13. To support this conclusion, the GAO stated that of the 32 competitions won by the private sector, 4 were terminated within 14 to 26 months. In one case, a services contract at Fort Riley, Kansas, was terminated after 19 months because of unsatisfactory contractor performance. In another case, the Air Force terminated a contract at Keesler Air Force Base, Mississippi, because of poor performance and a faulty PWS. The GAO also identified problems when the government won the cost study. It pointed to a 17-month delay the Air Force experienced when implementing the most efficient organization for aircraft maintenance operations at Altus Air Force Base, Oklahoma. Although recruiting enough personnel to perform the work, the Air Force had to arrange for other organizations to perform the work. *Id*. at 15.

888. *Id*. at 16 (recommending the Secretary of Defense issue guidance for the services to follow when improving cost study databases, and when monitoring and adjusting cost savings estimates resulting from the cost studies).

889. B-278903, Feb. 12, 1999, 99-1 CPD ¶ 33.

hire government employees to perform the administrative and clerical work. Encore filed a second protest, arguing that the agency did not have to administer the contract as one for personal services and the agency did not have a reasonable basis to cancel the RFP.

The GAO disagreed and found that the agency did, in fact, have a reasonable basis to cancel the RFP. The GAO reasoned that the agency had a need for personal services that it could satisfy only by hiring civil service employees. According to the GAO, the facts showed that the agency exercised continuous supervision and control over the contractor personnel performing the work. For example, contractor personnel worked in tandem with agency personnel, all performing the same functions and using the agency equipment. Agency managers directed, reviewed, and approved contractor personnel work. The same managers also requested pay increases and promotions for contractor personnel. The GAO upheld the contracting officer's decision to cancel the RFP and hire the employees and affirmed the long-standing rule that prohibits personal services contracts, absent a statutory exception.[891]

Construction Contracting

Trade Practice Used to Interpret Construction Specification

On 9 November 1995, the VA awarded a contract to J.A. Jones Construction to build an addition to an outpatient treatment facility at the VA Medical Center in San Juan, Puerto Rico.[892] The contract drawings required Jones to furnish concrete with compressive strengths of 3000 and 4000 pounds per square inch (psi), and the specifications required Jones to maintain certain minimum cement factors.[893] However, the contract specifications also permitted Jones to use either the field experience method[894] or the trial mix method[895] to proportion its concrete mixes.

On 26 February 1996, Jones submitted its proposed concrete mixes based on the field experience method. Unfortunately, these mixes did not meet the minimum cement factors specified in Table I. As a result, the VA rejected Jones's submittal. On 27 April 1996, Jones resubmitted its proposed concrete mixes "under protest" based on the trial mix method. Jones and its subcontractor, Concreto Mixto, alleged that the VA's insistence that it meet the minimum cement factors specified in Table I changed the contract.[896] Later, on 17 February 1997, Jones filed a claim for $89,663. At that time, Jones alleged specifically that Table I applied only to the trial mix method. The contracting officer disagreed and denied Jones's claim.

During a hearing, the Veterans Board of Contract Appeals (VABCA) relied primarily on Jones's witnesses.[897] These witnesses confirmed Jones's allegations that: (1) Table I only applied to the trial mix method,[898] and (2) industry standards required concrete suppliers to use the trial mix method and

890. FAR, *supra* note 17, at 37.104. A personal services contract is one that, by its express terms or as administered, makes the contractor personnel appear to be government employees. *Id*. at 37.101. Thus, the government is required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. *Id.* at 37.104(a). When an agency obtains personal services by contract, rather than by direct hire, it circumvents those laws unless Congress has authorized acquiring the services by contract. *Id.*

891. *Encore*, 99-1 CPD ¶ 33 at 4-5.

892. J.A. Jones Constr., VABCA No. 5414, 99-1 BCA ¶ 30,380.

893. *Id.* at 150,166. The specifications required Jones to comply with the following table:

TABLE I – CEMENT AND WATER FACTORS FOR CONCRETE

Concrete Type & Strength		Non-Air-EntrainedConcrete		Air-Entrained Concrete	
Concrete Type	Min. 28 Day Comp. Str. PSI	Min. Cement Factor Pounds Per Cu. Yd.	Maximum Water Cement Ration	Min. Cement Factor Pounds Per Cu. Yd.	Maximum Water Cement Ration
D	4000 (1,3)	550	0.55	570	0.50
C	3000 (1,3)	470	0.65	490	*
CL	3000 (1,2)	500		520	*

Id. In addition, the specifications required Jones to "maintain minimum cement factors in Table I regardless of compressive strength developed above minimums." *Id.* The two types of concrete at issue in this case were the "Non-Air Entrained" concrete types D and C. *Id.*

894. *Id*. The "field experience method" is a method of proportioning concrete mixes that relies on the concrete producer's experience and field observations regarding slump, pumpability, finishability, and vibrator response. When the producer's field observations confirm that the strength, durability, shrinkage, and economy of the proposed concrete mix are satisfactory, the producer is not required to engage in further analysis. Kenneth C. Hover, *Concrete Design: Part 3*, CE NEWS ONLINE (Nov. 1998) (visited Dec. 8, 1999) <http://www.cenews.com/edconc1198.html>.

895. *J.A. Jones Constr.*, 99-1 BCA ¶ 30,380 at 150,166. In the "trial mix method," the concrete producer prepares a trial batch that it tests based on the required performance parameters (e.g., compressive strength, unit weight, density, permeability, etc.) prior to use. Hover, *supra* note 894.

comply with minimum cement factors only if the supplier lacked past experience. The VA nevertheless argued that the clear and unambiguous language of the specifications required Jones to use Table I regardless of which method it chose to proportion its concrete mixes. The VABCA disagreed.

The board conceded that the specifications did not expressly limit Table I to the trial mix method; however, the board concluded that it would be wasteful to allow a contractor to analyze concrete mix proportions using the field experience method, and then deny the contractor the authority to use the resulting data. In addition, the VABCA concluded that the VA's interpretation was unreasonable given the evidence of trade practice and custom.[899] As a result, the VABCA held that Table I applied only to the trial mix method and the VA's insistence that it meet the minimum cement factors specified in Table I changed the contract.

Doubling Duration of Construction Contract Was Not a Breach

In *Hill Construction Corp.*,[900] the ASBCA concluded that doubling the duration of a contract did not automatically breach the contract. The Navy in that case awarded to Hill Construction Corporation a contract that originally required Hill to complete performance by 26 March 1994. The parties, however, agreed subsequently to extend the contract completion date to 14 May 1995.[901]

On 31 July 1995, Hill requested an equitable adjustment for "lost earnings/revenue associated with government delays."[902] Hill alleged that numerous changes and work stoppages plagued the contract and prevented Hill from using its resources (for example, its project superintendent and his crew/equipment) to their full profit potential on other projects. Hill asked the Navy to pay it an additional $307 per day from 27 March 1995 to 14 May 1995, for a total of $127,300.

The contracting officer denied Hill's claim, and Hill appealed. The Navy then moved for summary judgment, arguing that Hill was seeking lost profits and would have to show that the Navy breached the contract to recover. In response, Hill argued that doubling the contract duration constituted a cardinal change because it changed the contract fundamentally. The ASBCA disagreed, stating that: "Without more, appellant cannot prevail, as there is no point at which a delay is automatically converted to a breach."[903] As a result, the ASBCA granted the Navy's motion for summary judgment,[904] as well as the Navy's motion to dismiss for lack of jurisdiction.[905]

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896. *J.A. Jones Constr.*, 99-1 BCA ¶ 30,380 at 150,166-67. Jones and Concreto Mixto made four allegations. First, they alleged the trial mix method produced compressive strengths 1000 psi greater than the field experience method. Second, they alleged that the specifications permitted Jones to use either method. Third, they alleged that the VA had accepted concrete mixes previously at the same medical center based on the field experience method. Finally, they alleged that the concrete suppliers in Puerto Rico typically used the field experience method to proportion the concrete mixes. In fact, Concreto Mixto alleged that American Concrete Institute (ACI) 318, which specifies the ACI's building code requirements for reinforced concrete, required concrete suppliers only to use the trial mix method and comply with the minimum cement factors if the supplier lacked past experience, or special conditions required extra cement. *Id*.

897. *Id*. at 150,168. The VABCA discounted the testimony of the VA's witnesses after noting that "[n]one of those witnesses demonstrated any particular expertise in concrete mix design." In contrast, the VABCA gave great deference to Jones's witnesses–particularly the concrete consulting engineer who had 40 years experience and was an ACI fellow and a voting member of the American Society for Testing and Materials committee on concrete and concrete aggregates. *Id*.

898. *Id.* Jones's consultant actually testified that applying Table I to the field experience method would be "inconsistent and illogical." *Id.*

899. *Id.* at 150, 169-70. The VA argued that industry standards were irrelevant because the specifications were clear and unambiguous; however, the VABCA relied on the CAFC's recent decision in *Metric Constructors, Inc. v. National Aeronautics and Space Administration*, in which the CAFC stated:

> Trade practice and custom illuminate the context for the parties' contract negotiations and agreements. Before an interpreting court can conclusively declare a contract ambiguous or unambiguous, it must consult the context in which the parties exchanged promises. Excluding evidence of trade practice and custom because the contract terms are "unambiguous" on their face ignores the reality of the context in which the parties contracted. That context may well reveal that the terms of the contract are not, and never were, clear on their face. On the other hand, that context may well reveal that contract terms are, and have consistently been, unambiguous.

Id. (quoting Metric Constructors, Inc. v. National Aeronautics and Space Admin., 169 F.3d 747, 752 (Fed. Cir. 1999)).

900. ASBCA No. 49820, 99-1 BCA ¶ 30,327.

901. *Id.* at 149,970. The modification–which both parties signed–stated that:

> Acceptance of this modification by the Contractor constitutes an accord and satisfaction and represents payment in full (for both time and money) for any and all costs, impact effect and/or delays arising out of, or incidental to the work as herein revised and the extension of the contract completion date.

Id.

902. *Id.*

903. *Id.* at 149,972.

Government May Impose Liquidated Damages for Failure to Demobilize Construction Site

In *Formal Management Systems, Inc.*,[906] the ENGBCA considered whether the Panama Canal Commission (PCC) could assess liquidated damages against a contractor for not demobilizing the construction site in a timely manner. The PCC divided the contract into ten phases. Phases 1-9 required Formal Management Systems, Inc. to clean and paint two miter gate leaves at the Panama Canal, and Phase 10 required Formal to clean the Tug/Miter Gate Repair Facility and remove its facilities, materials, and equipment from the area. The contract further required Formal to complete Phase 9 by 4 June 1994, and Phase 10 by 5 August 1994.[907] Formal completed Phase 9 in a timely manner, but failed to demobilize the site completely. Formal left a 30-foot container, some scaffolding, and a 200-gallon diesel tank in the Industrial Division area until 24 September 1994.[908] As a result, the PCC withheld liquidated damages in the amount of $3750 from Formal's final payment.[909]

In its subsequent appeal, Formal alleged that the PCC could not assess liquidated damages against it because: (1) Formal's delay did not damage the PCC, and (2) it had completed the contract substantially by 5 August 1994. The board disagreed. With respect to Formal's first allegation, the board indicated that the lack of actual damages was irrelevant because the parties' agreement regarding the daily liquidated damages rate was reasonable at the time of contract award.[910] The board then rejected Formal's allegation that it had completed the contract substantially by 5 August 1994. The board found that each phase of the contract was equally important. Therefore, Formal could not complete the contract substantially until it completed Phase 10, which it did not do until 24 September 1994.[911]

Cost and Cost Accounting Standards

Update: Cost Accounting Standards Board (CASB) Review Panel Recommendations

On 12 April 1999, the CASB Review Panel issued a report outlining its final recommendations for the restructuring of CASB and its mission.[912] Significant recommendations include: (1) doubling the threshold for full Cost Accounting Standard (CAS) coverage from $25,000,000 to $50,000,000; (2) amending the board's authorizing statute to limit CAS applicability to contracts exceeding $7,500,000 or more; and (3) exempting firm-fixed-price contracts from CAS where the government does not obtain certified cost or pricing data at the time of award.[913] The review panel also recommended moving the CASB out of the OFPP as an independent agency to ensure future autonomy.

Allowability of Legal Costs for Qui Tam Defense

On 30 October 1998, the Civilian Agency Acquisition Council and the DAR Council issued a final rule amending FAR 31.205-47, which governs the allowability of the costs of legal and other proceedings.[914] The final rule disallows costs incurred by contractors in defending qui tam lawsuits under the False Claims Act (FCA).[915] The final rule, however, allows

904. *Id.* In granting the Navy's motion, the ASBCA noted the parties' bilateral modification precluded it from considering any prior causes of delay. *Id.*

905. *Id*. The Navy filed its motion to dismiss at the same time it filed its motion for summary judgment. The ASBCA granted the Navy's motion to dismiss after concluding that Hill did not submit a claim to the contracting officer for anything other than lost profits. *Id*.

906. ENGBCA No. PCC-145, 99-1 BCA ¶ 30,137.

907. *Id*. at 149,076. The contract originally required Formal to complete Phase 9 by 26 April 1994, and Phase 10 by 2 May 1994; however, the parties modified the contract to change the completion dates. *Id.*

908. *Id*. at 149,078. The Industrial Division area was located near the Tug/Miter Gate Repair Facility. Formal alleged that Industrial Division personnel gave it permission to leave its equipment in the area; however, the Industrial Division personnel did not have the authority to waive the contract provision that required Formal to demobilize the site. *Id.*

909. *Id*. The contract permitted the PCC to assess liquidated damages totaling $5000 for each day of delay in Phase 9, and $75 for each day of delay in Phase 10. Therefore, PCC assessed liquidated damages in the amount of $3750 for the 50 days Formal delayed the completion of Phase 10 (i.e., 5 August 1994 to 24 September 1994). *Id*. at 149,077-78.

910. *Id.* at 149,081. The board relied on the distinction between the Phase 9 and Phase 10 liquidated damages rates and the PCC's plans to build a warehouse and perform other contracts in the area where Formal was storing its equipment to conclude that the parties' agreement regarding the daily liquidated damages rate was reasonable. *Id*. at 149,079-81.

911. *Id*. at 149,082. The board noted that Formal's allegation that it had completed the contract substantially when it completed Phase 9 would render the parties' agreement regarding the Phase 10 liquidated damages meaningless. In addition, the board noted that Formal could have stopped the daily liquidated damages at any time simply by moving its equipment. *Id.* at 149,081-82.

912. *CAS Board: Panel Urges Moving Cost Accounting Board, Doubling Threshold, Retaining Trigger Level*, Fed. Cont. Daily (BNA) (Apr. 13, 1999), *available in* LEXIS, New Library, BNAFCD file. The final report, titled *Future Role of the Cost Accounting Standards Board*, is available at <http://www.gao.gov>.

913. The Fiscal Year 2000 Defense Authorization Act mandated these changes to CAS. *See* Appendix A.

contractors to recover up to eighty percent of its reasonable costs if: (1) the qui tam suit settles, (2) the government did not intervene in the suit, and (3) the contracting officer determines that the qui tam relator was unlikely to win on the merits.[916]

No Legal Costs for Northrop in Whistleblower Retaliation Case

This past year, the CAFC reversed the ASBCA in a whistleblower case, ruling that legal costs incurred by Northrop in defending a wrongful discharge action brought by former employees in a state court were neither allowable nor allocable under the contract.[917] In March 1998, the ASBCA ruled that Northrop is entitled to recover the legal costs it incurred in defending against a wrongful termination action by former employees, even though the jury ruled against it.[918] The board ruled that the jury verdict was not determinative of cost allowability. The board concluded that neither the trial transcripts nor the jury verdict was conclusive evidence of contractor fraud or other improprieties.[919]

The CAFC held that the board should have granted preclusive effect to the state proceedings because the issue of Northrop's fraudulent behavior had been litigated in state court and was necessary to the final judgment. In addition, the CAFC held that a cost is allocable to the government only if the government gains some benefit from incurring the cost. Because the CAFC could not find any benefit to the government in Northrop's defense of the suit, the court held that Northrop's legal costs were not allocable to the contract.[920]

Defective Pricing

Decision to Amortize Nonrecurring Costs Does Not Qualify as Offset

The ASBCA addressed the issue of offsets in AM General Corp.[921] The U.S. Army Tank and Automotive Command (TACOM) and AM General Corporation (AMG), the manufacturer of High Mobility Multipurpose Wheeled Vehicles (HMMWV), filed cross motions for summary judgment on the issue of AMG's entitlement to a defective pricing offset. AMG characterized the basis for the offset as an "intentional understatement" of its nonrecurring costs for tooling and preproduction engineering.[922] If allowed, the offset would have exceeded TACOM's defective pricing claims.

The TACOM awarded AMG the HMMWV contract after evaluating proposals from the three prototype development contractors. In its cost proposal to TACOM, AMG decided to amortize its tooling and preproduction engineering costs over 125,000 vehicles (total estimated vehicle demand), rather than over the contract's base quantity of 54,950 vehicles.[923] The

914. 63 Fed. Reg. 58,586 (1998).

915. FAR 31.205-47(b), as amended, states:

> (b) Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including agents or employees), or costs incurred in connection with any proceedings brought by the United States under the False Claims Act . . . are unallowable if the result is–
>
> (1) In a criminal proceeding, a conviction; (2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct; (3) A final decision by an appropriate official of an executive agency to [debar, rescind the contract, or terminate for default]; (4) Disposition of the matter by consent or compromise if the [result would have been the same as (1), (2), and (3)]; (5) [where costs are otherwise unallowable].

FAR, *supra* note 17, 31.205-47(b).

916. *Id.* at 31.205-47(c)(2), (c)(3).

917. Caldera v. Northrop Worldwide Aircraft Servs., Inc., No. 98-1500, 1999 U.S. App. LEXIS 21888 (Fed. Cir. Sept. 10, 1999).

918. Northrop Worldwide Aircraft Servs., Inc., ASBCA Nos. 45216, 45877, 98-1 BCA ¶ 29,654. In 1990, three Northrop employees filed a civil wrongful termination suit against Northrop in the District Court of Comanche County, Oklahoma. They alleged that Northrop wrongfully terminated their employment for refusing to participate in fraud against the government. *Id*. For additional facts and analysis of the board's holding, see Major Hong, *Allowable Cost: Contractor Can Claim Legal Costs Even Though it Lost Wrongful Discharge Case*, ARMY LAW., July 1998, at 66.

919. *Id.* at 146, 935. The jury in the state court case failed to make specific findings of fraud or illegal acts by Northrop. Instead, it opted to make general findings. *Id.*

920. *Caldera*, 1999 U.S. App. LEXIS 21888, at *25.

921. ASBCA No. 48476, 99-1 BCA ¶ 30,130.

922. *Id*. AMG was able to seek such an offset because it received contract award in 1983, prior to the 1986 amendment of the Truth in Negotiations Act (TINA) which prospectively disallowed offsets for intentional understatements. Department of Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 952, 100 Stat. 3947 (1986) (codified at 10 U.S.C.A. § 2306a (e)(4)(B) (West 1999)).

TACOM knew that this departed from the normal costing and pricing procedures contained in AMG's Disclosure Statement.

In its argument to the ASBCA, AMG contended that the CAFC decision in *United States v. Rogerson Aircraft Controls*[924] supported its offset argument. The ASBCA disagreed stating that the sole issue before the *Rogerson* court was whether an intentional understatement of costs was disqualified automatically as an offset. The board stated its belief that the court in *Rogerson* did not intend to hold that errors of judgment qualify as offsets[925] and proceeded to characterize AMG's decision to amortize nonrecurring costs over 125,000 vehicles as "at most, errors of judgment."[926] Finding that AMG's method of amortization contained no inaccurate, incomplete, or noncurrent cost or pricing data, the board cited *Norris Industries, Inc.*[927] and held that AMG could not use its nonrecurring costs for tooling and preproduction engineering as an offset.

The ASBCA and District Court Address Price Adjustment Computation

In *McDonnell Douglas Helicopter Systems* (MD),[928] the ASBCA held the government was entitled to a contract price adjustment resulting from defective pricing of the third production buy of the APACHE helicopter. However, the board remanded the case to the contracting officer to compute the price adjustment amount because the government had used the wrong baseline in its initial calculation.

During negotiations of the sole source buy, MD provided the government with its cost and pricing proposal, to include a subcontractor proposal for auxiliary power units (APU). To establish its negotiating position, the government applied price/quantity curves and learning curves to MD's cost and pricing data. Before the parties reached agreement on price, MD received an update to the APU proposal. MD did not forward the update to the government. After contract award, the government audited the APU subcontract and discovered defective pricing. Using the *updated* APU proposal as the baseline, the government calculated the amount of the price adjustment.

The ASBCA held that the correct baseline for computing the price adjustment was MD's initial proposal because the government never received, and therefore never relied upon, the updated APU proposal. The board also found the price adjustment computation deficient by its failure to consider the effects of price/quantity and learning curves.[929]

Meanwhile, the U.S. District Court for the District of Connecticut addressed the price adjustment issue in a case involving the Navy and Sikorsky Aircraft.[930] The parties agreed an adjustment was due because Sikorsky failed to disclose a lower-priced subcontract quote, but disagreed as to the amount of the adjustment. The adjustment depended on the difference between the disclosed price quote ($860) and the undisclosed cost data. A Sikorsky report, completed after fact finding with its subcontractor, contained three sets of figures: (1) the revised price quotes from the subcontractor ($226.59 and $213.60 for two different kit numbers), (2) recommended maximum prices ($166 and $155), and (3) recommended optimal prices ($156 and $146). The government negotiator testified he probably would have used the maximum price in his cost model. In support of its position, Sikorsky pointed to the government's pre- and post-negotiation memoranda which stated that the government negotiator estimated material costs by reducing quota-

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923. *Id.* AMG eventually produced 71,984 vehicles during the contract performance period.

924. 785 F.2d 296 (Fed. Cir. 1986).

925. Indeed, this year the CAFC addressed the scope of its *Rogerson* holding:

> Rogerson, a government contractor, was held to be entitled to an offset where it intentionally provided errant or unrepresentative *pricing data* to the government prior to oral negotiations . . . We have never determined whether, under TINA as it existed prior to the 1986 amendment, an intentional understatement of costs outside of the circumstances of Rogerson could form the basis for an offset against a defective pricing claim . . . [O]utside the limited facts of Rogerson, where the government was fully informed and not misled, a government contractor should not be allowed to withhold pertinent cost data from the government and then be rewarded for the withholding.

United Technologies Corp., Pratt & Whitney v. Peters, No. 98-1400, 1999 U.S. App. LEXIS 15490, at *6-*8 (Fed. Cir. July 12, 1999) (emphasis added) (affirming in-part denials of offsets for "sweep" data possessed by the contractor and intentionally withheld from the government prior to the certification date). Therefore, the CAFC, as did the ASBCA in *AM General*, read the *Rogerson* decision to apply to intentionally understated pricing data known to the government, not errors in judgment.

926. *AM General*, 99-1 BCA ¶ 30,130 at 149,049.

927. ASBCA No. 15442, 74-1 BCA ¶ 10,482 (finding that errors in judgments, as distinguished from inaccurate, incomplete, or non-current factual data, provide no basis for either a price adjustment or an offset under the Truth in Negotiations Act).

928. ASBCA No. 50341, 1999 ASBCA LEXIS 124 (Aug. 20, 1999).

929. *Id.* at *86.

930. United States v. United Technologies Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167 (D. Conn. 1999).

tions by 10.3%. Consequently, Sikorsky argued that the proper amount to use for the price adjustment was the subcontractor quote reduced by 10.3%. Stating that the government's computation of a price adjustment was "within the zone of reasonableness," the district court rejected Sikorsky argument for the lower adjustment.[931]

Limits on Contracting Officer's Discretion to Request Certified Data

In *United Technologies Corp. v. Pratt & Whitney*, the Air Force sought $95.7 million as a price adjustment for alleged defective pricing associated with a 1984 contract with Pratt & Whitney (P&W) for fighter engines.[932] P&W appealed to the ASBCA and alleged in its complaint that the claim failed because the Air Force wrongfully required certified cost or pricing data for a contract awarded as a result of price competition. The Air Force moved to dismiss, arguing that the contracting officer had absolute discretion both to require certified cost or pricing data and to include a price adjustment clause where the price was negotiated based on adequate price competition.

The ASBCA denied the Air Force's motion. Upon review of the relevant Truth In Negotiations Act (TINA) and Defense Acquisition Regulation (DAR) provisions, the board determined that there were certain circumstances when the regulation required a contracting officer not to require certified cost or pricing data. If the contracting officer still required certified data and inserted a price adjustment clause in the contract, such action might constitute an abuse of discretion.[933]

Environmental Contracting

Buying Green: The Trend Continues

The EPA Issues Guidelines for Procuring Products Containing Recovered Materials

On 8 June 1999, the EPA issued a final rule increasing the total number of items that are or may be made with recovered materials from nineteen to fifty-five.[934] Within one year, each procuring agency must develop an affirmative procurement program ensuring that it will purchase these items to the maximum extent practicable. Agencies also must ensure that how they use the item does not jeopardize its intended end use. The statutory requirement to purchase these items only applies to procurements over $10,000. It also applies where the purchased quantity of functionally equivalent items procured in the fiscal year exceeds $10,000.[935]

The EPA Issues Final Guidelines for Buying Environmentally Preferable Products and Services

In addition to the guideline items, the EPA also has published final guidance to help government agencies buy goods and services that are less harmful to the environment and human health.[936]

The EPA guidance includes five "Guiding Principles" for agencies to use when building environmental preferences into their acquisitions. First, the guidance states that agencies should consider environmental factors as a routine part of the acquisition. The guidance suggests that environmental factors should be a subject of competition among vendors seeking government contracts. In turn, this will stimulate vendors to offer improved environmental products and services.[937] Second, the

931. *Id.* at 194.

932. ASBCA No. 51410, 99-2 BCA ¶ 30,444.

933. *Id.* at 50,427.

934. 64 Fed. Reg. 22,023 (1999). The EPA issued the proposed rule in 1998. 63 Fed. Reg. 45,558 (1998). The guideline items include nylon carpet with backing containing recovered materials, carpet cushions, flowable fill, railroad grade crossing surfaces, park and recreational furniture, playground equipment, food waste compost, plastic lumber landscaping timbers and posts, solid plastic binders, plastic clipboards, plastic file folders, plastic clip portfolios, plastic presentation folders, absorbents and adsorbents, awards and plaques, industrial drums, mats, signage, and manual-grade strapping. Other items include floor tiles, structural fiberboard, laminated paperboard, tires, oil, cement and concrete containing fly ash, paper products, building insulation, engine coolants, floor tile, patio blocks, traffic cones, traffic barricades, playground surfaces, running tracks, hydraulic mulch, yard trimmings compost, office recycling containers, office waste receptacles, plastic desktop accessories, toner cartridges, binders, and plastic trash bags. For additional information about the affirmative procurement program, see <http://www.epa.gov/epaoswer/non-hw/procure.htm>.

935. *Id.* The Resource Conservation and Recovery Act (RCRA) offers some exceptions to these requirements. These exceptions apply if the procuring contracting officer determines that the items meeting the statutory requirements are not reasonably available within a reasonable period of time, fail to meet the performance standards set forth in the specifications, or fail to meet the reasonable performance standards of the procuring agencies. The contracting officer also considers price, availability, and competition.

936. 64 Fed. Reg. at 45,810. These guidelines seek to create a greater demand for environmental preferable products and services and minimize the amount of toxicity and waste. The EPA published this guidance to implement Executive Order 13,101, which requires executive branch agencies to recycle, and to use environmentally preferable products and services. Exec. Order 13,101, 63 Fed. Reg. 49,643 (1998).

937. 64 Fed. Reg. at 45,817.

guidance recommends that agencies root their environmental purchasing strategies in the "ethic of pollution prevention."[938] By reducing waste and pollution at the source, the guidance opines that agencies can protect the environment and cut costs.[939] Third, the guidance advises agencies to consider the life-cycle stages of a product or service. Noting that a product or service has many "stages" of use, the guidance reminds agencies to buy products or services "with as few negative environmental impacts in as many life cycles as possible."[940] Fourth, the guidance recommends that agencies compare the environmental impacts of competing products and services to select the one that is the most environmentally preferable.[941] Finally, the guidance urges agencies to gather comprehensive, accurate and meaningful information about the environmental performance of products or services.[942]

New Executive Order: Greening the Government Through Efficient Energy Management

On 3 June 1999, President Clinton issued Executive Order 13,123, entitled "Greening the Government Through Efficient Energy Management."[943] The executive order challenges federal agencies to be more energy efficient: "The Federal Government, as the Nation's largest energy consumer, shall significantly improve its energy management in order to save taxpayer dollars and reduce emissions that contribute to air pollution and global climate change."[944]

The executive order promotes the use of "energy-savings performance contracts." These contracts provide for the "performance of services for the design, acquisition, financing, installation, testing, operation, and where appropriate, maintenance and repair, of an identified energy or water conservation measure or series of measures at one or more locations."[945] Payment to the contractor hinges on realizing a sum certain of future energy and cost savings.

In addition, the executive order establishes a Public and Private Advisory Committee to provide input on federal energy. For example, the committee will advise agencies on how to increase the use of energy-saving performance contracts; how to streamline the purchase of "Energy Star" and other energy efficient products; how to improve building designs and reduce energy use; and how to enhance the use of efficient and renewable energy technologies at federal facilities. The executive order also requires agencies to consider life-cycle costs when buying energy efficient goods and services.[946]

Ozone Depleting Substances (ODS)

In 1999, the EPA was busy issuing either proposed or final ODS rules. For practitioners, these changes purport to further tighten the DOD's use of ODS's in its contracts. A summary of the key EPA actions follows.

Accelerated Phase-Out Date of Methyl Bromide

On 1 June 1999, the EPA issued a final rule revising the accelerated phaseout regulations for the production, import, export, transportation, and destruction of methyl bromide, a Class I ODS.[947] The change is based on recent agreements con-

938. *Id.* at 45,818.

939. *Id*. The guidance notes that pollution prevention measures "can lead to a higher degree of environmental protection by reducing subsequent costs for disposal or cleanup of hazardous wastes and materials." *Id*.

940. *Id*. at 45,819. The life-cycle of a product or service includes its manufacture, use, distribution, and disposal. The guidance states that agencies may determine the "environmental preferability" of a product or service by comparing the severity of environmental damage it causes throughout its life with that of competing products. *Id*.

941. *Id.* at 45,821. The guidance offers a scenario when an agency may have to trade-off environmental attributes:

> In determining environmental preferability, Executive agency personnel might need to compare the various environmental impacts among competing products or services. For example, would the reduced energy requirements of one product be more important than the water pollution reductions associated with the use of a competing product? The ideal option would be a product that optimized energy efficiency and minimized water pollution. When this is not possible, however, Executive agency personnel will have to choose between the two attributes.

Id.

942. *Id.* at 45,823.

943. *Id.* at 30,851. This executive order is a companion to Executive Order 13,101.

944. *Id.*

945. *Id.*

946. *Id.* The executive order states: "Agencies shall use life-cycle cost analysis in making decisions about their investments in products, services, construction, and other projects to lower the Federal Government's costs and to reduce energy and water consumption." *Id*.

cerning the U.S. obligation under the Montreal Protocol to phase out ODS. This new schedule comports with the current statutory requirement applicable to the DOD, which prohibits specifications that require ODS, absent a waiver.[948]

Protection of Stratospheric Ozone: Reconsideration of the Nonessential Products Ban

On 14 June 1999, the EPA proposed a rule to change the current regulations that ban nonessential products releasing Class I ODS.[949] Many companies and federal agencies continue to use ODS in certain products the EPA now considers "nonessential" because acceptable substitutes are available. These items include aerosol products, pressurized dispensers, plastic foam products, and air-conditioning and refrigeration products that contain or are manufactured with chlorofluorocarbons. In its rule, the EPA proposes adding these products to the existing list of those banned for nonessential use.

Listing Of Substitutes for ODS

On 3 March 1999, the EPA published a final rule approving certain substitutes for ODS.[950] The EPA approved these substitutes under its Significant New Alternatives Policy Program. Under this program, the EPA evaluates ODS substitutes to determine whether they present a lesser risk to the environment. Upon successful evaluation, the EPA lists the substitute in the Federal Register. The substitutes the EPA listed in the final rule are for ODS used in refrigeration and air-conditioning.[951]

New Executive Order: Invasive Species

On 3 February 1999, President Clinton issued a new executive order on Invasive Species.[952] The new executive order has two goals: (1) to prevent the introduction of invasive species into the environment; and (2) to minimize the economic, ecological, and human health impacts of invasive species. An invasive species is defined as an alien species whose introduction "does or is likely to cause economic or environmental harm or harm to human health."[953] How does this relate to government contracting? The executive order states that the federal government cannot spend funds on any action (including contract actions) that it believes are likely to cause or promote the introduction or spread of invasive species within the United States.[954]

Violating Environmental Statutes Equals No Government Contracts

On 13 May 1999, the FAR Council issued a proposed rule to remove FAR subparts 23.1, 52.223-1, and 52.223-2.[955] These

947. *Id.* at 29,240. In the final rule, the EPA amended previous regulations governing the 1991 baseline levels of production and consumption allowances for methyl bromide. For the 1999-2000 period, the EPA established a 25% reduction in those allowances. *Id.* The EPA also stated that it would plan a additional steps in the phaseout schedule is as follows: (1) beginning 1 January 2001, a 50% reduction in baseline levels; (2) beginning 1 January 2003, a 70% reduction in baseline levels; and (3) beginning 1 January 2005, a complete phaseout with emergency and critical use exemptions permitted. *Id.*

948. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 326(a), 106 Stat. 2315 (1992). Section 326(a) states:

> No [DOD] contract awarded after June 1, 1993, may include a specification or standard that requires the use of a class I [ODS] or that can be met only through the use of such a substance unless the inclusion of the specification or standard in the contract is approved by the senior acquisition official (SAO) for the procurement covered by the contract.

949. 64 Fed. Reg. 31,772 (1999). In 1993, the EPA issued regulations banning nonessential products releasing ODS. 58 Fed. Reg. 4768 (1993). When determining if a product is "nonessential," the EPA considers several criteria, such as the purpose or intended use of the product and the availability of acceptable substitutes. 64 Fed. Reg. at 31,774.

950. 64 Fed. Reg. at 10,374.

951. *Id.*

952. Exec. Order No. 13,112, 64 Fed. Reg. at 6183.

953. 64 Fed. Reg. at 6183.

954. *Id.* This part of the executive order states:

> Each federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law,
>
> . . . . .
>
> (3) not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.

Id. The executive order exempts the DOD from these requirements if the Secretary of Defense finds it necessary for national security reasons. *Id.* at 6186.

clauses now require contract awardees to certify that they have not violated either the Clean Air Act or Clean Water Act at the facility they planned to use to fulfill the contract. This change would not affect the current rule that violators of these acts cannot receive government contracts. Instead, the proposed rule deletes the certification requirements. In the future, the EPA will rely on the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs to provide current information on contractors that violate the acts.[956]

Ethics in Government Contracting

Rules and Guidance: A Summary

In 1999, the Office of Government Ethics (OGE) and the Director of the DOD Standards of Conduct Office (SOCO) issued rules and guidance on several areas affecting procurement practitioners. A summary of the new rules and guidance follows.

Changes to OGE Job Hunting Rules

On 16 April 1999, the OGE issued final rules[957] amending subpart F of its standard of conduct regulations.[958] In the final rules, the OGE aligned its regulatory language with that of 18 U.S.C.A. § 208. The amendments codify OGE's long-standing advice that 18 U.S.C.A. § 208 applies to "personal and substantial participation" in a particular matter, when that matter would have a "direct and predictable" effect on the financial interests of a potential employer. Thus, the new rules extend the scope of coverage for 18 U.S.C.A. § 208 to subpart F, both for the restrictions of § 208 on negotiating for employment, and the restrictions of Executive Order 12,674 on seeking employment.[959]

The DOD Issues Guidance on Procurement Integrity Compensation Ban

On 10 August 1999, the Director of the DOD SOCO issued guidance[960] for the DOD agencies to use when applying the one-year compensation ban of the PIA to program managers.[961] The PIA bans program managers from accepting compensation from a contractor performing a contract in excess of $10 million for one year after serving in that capacity.[962] This memorandum is the second product of the Procurement Integrity Tiger Team (PITT).[963] In particular, the memorandum explains the types of duties an employee must perform to qualify as a program manager, such as managing the cost, performance, and schedule of the program.[964] Moreover, the memorandum cautions ethics counselors that the existence of a contract in excess of $10 million is insufficient to trigger the compensation ban. Rather, the memorandum directs each DOD component to determine whether that particular contract has a person performing the program manager functions.[965] Finally, the memorandum notes that a DOD program in excess of $10 million may have more than one person performing program manager functions, all of whom are subject to the one-year compensation ban.[966]

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955. 64 Fed. Reg. at 26,264.

956. *See Acquisition Reform Network, List of Parties Excluded from Federal Procurement and Nonprocurement Programs* (visited Nov. 15, 1999) <http://www.arnet.gov/epls>.

957. 64 Fed. Reg. at 13,063. The OGE issued proposed rules at 63 Fed. Reg. 45,415 (1998). For a synopsis of the proposed rules, see *1998 Year in Review, supra* note 3, at 95.

958. *See* 5 C.F.R. § 2635.601-606 (1999).

959. Exec. Order 12,674, 3 C.F.R. § 215 (1990).

960. Memorandum, Director, DOD Standards of Conduct Office, to Member of the DOD Ethics Community, subject: Guidance on Application of Procurement Integrity Compensation Ban to Program Managers (10 Aug. 1999) *available at* <*http://www.defenselink.mil/dodgc/defense_ethics/*> [hereinafter SOCO Memorandum].

961. 41 U.S.C.A. § 423 (West 1999).

962. *Id*. § 423(d). The one year ban applies to other former government officials as well, such as the procuring contracting officer, the administrative contracting officer, the source selection authority, members of the source selection evaluation board, and chief of a financial or technical evaluation team. *Id*. § 423(d)(1)(A)-(B). The PIA also bans former officials who "personally" made certain decisions on a procurement in excess of $10 million. These decisions include awarding a contract, subcontract, modification, or task or deliver order; establishing overhead rates for the contract; approving contract payments; and paying or settling a claim on that contract. *Id.* § 423(d)(1)(C).

963. The DOD formed the PITT to propose guidance for the DOD agencies when applying and interpreting the PIA. Members of the PITT include the DOD Standards of Conduct Office, the individual services, the Defense Logistics Agency, and the National Security Agency. The PITT issued its first memorandum interpreting the PIA in 1998. *See* Memorandum, Director, DOD Standards of Conduct Office, to Members of the DOD Ethics Community, subject: Guidance on Application of the Procurement Integrity Law and Regulation (28 Aug. 1998), *available at* <http://www.defenselink.mil/dodgc/defense_ethics/>. *See 1998 Year in Review, supra* note 3, at 95-96.

964. SOCO Memorandum, *supra* note 960, at 1. Interestingly, the SOCO Memorandum states that the compensation ban will not cover a Program Executive Officer (PEO) if the PEO does not perform the functions of a program manager for any particular contract. *Id*.

Partnering with Defense Contractors

In recent years, the DOD has developed a closer working relationship with the private sector. These stronger ties have been fueled by the explosion of cost studies under OMB Circular A-76 and the DOD's commitment to use the best practices from private sector. Recognizing that the DOD is using increasingly more contractors in the workplace, the DOD SOCO has released guidance dissecting the thorny ethics and procurement issues arising when government employees and contractor personnel work together.[967] Using illustrative examples, the forty-five page guidance document applies existing statutes and regulations to the relationships between employees and contractors. In particular, it discusses the issues and problems within the framework of the chapters in the Joint Ethics Regulation (JER),[968] such as conflicts of interest, gifts, post-employment restrictions, and use of government resources.[969] Thus, the guidance highlights the numerous standards of conduct issues facing government employees when working with contractors. Likewise, the guidance educates contractors about the statutory and regulatory restrictions imposed on government employees.

Disclosing Price Range Not a PIA Violation

In *DGS Contract Service, Inc. v. United States*,[970] the COFC ruled that the contracting officer did not violate the PIA when he disclosed to all offerors their respective standings in the competitive price range. In *DGS*, the IRS issued a solicitation for guard services. After evaluating the proposals, the IRS informed DGS that the "apparently successful offeror" was Mike Garcia Merchant Security, Inc. (MGM).[971] The same day, 22 September 1998, DGS requested a post-award debriefing, which the IRS conducted on 24 September 1998. During the debriefing, the contracting officer disclosed to DGS its technical ratings and noted that its price proposal was lower than MGM's. The DGS official threatened to file a bid protest alleging the IRS failed to conduct meaningful discussions with it on certain evaluation factors. Although the IRS disagreed, it decided to reopen negotiations with the four offerors in the competitive range, giving each a chance to revise its proposal.

During the discussions, the IRS told MGM of its standing in the competitive range regarding its price proposal: "With regard to price, [you] are on the lower end, but not the lowest priced offeror."[972] Likewise, the IRS told DGS that it was "on the low end of the competitive range."[973] In fact, the contracting officer told all offerors whether they stood on the high or low end of the price range. Each offeror, except for DGS, submitted revised price proposals to the contracting officer. The IRS awarded the contract to MGM; DGS again requested a debriefing, which it received. The contracting officer told DGS that both it and MGM were technically equal, with price the determining factor in the award decision. Thus, MGM won the

965. The SOCO Memorandum offers an example to illustrate this point:

> For example, some contracts have only a Contracting Officer Representative (COR) or Contracting Officer Technical Representative (COTR), and this individual might not perform the type of functions discussed above. In this case, the individual will not be a program manager for the purpose of the ban. In contrast, however, a maintenance and repair contract for the renovation of a dorm may have an individual who performs the type of functions discussed above, regardless of his or her title. That individual will be covered by the ban.

Id.

966. *Id.* at 1-2. The SOCO Memorandum offers another example highlighting this point:

> For example, on a major program that is supported by several $10 million contracts, there may be separate individuals who perform the functions of a program manager with respect to each individual contract. Those individuals would have a compensation ban regarding that contractor. There could also be an individual who functions as the program manager for the entire program. That individual may have compensation bans regarding all prime contractors involved in the program.

Id. at 2.

967. Standards of Conduct Office, U.S. Dep't of Defense, Guidance on Ethics Issues in Government-Contractor Teambuilding (1999) *available at* <http://www.defenselink.mil/dodgc/defense_ethics/> [hereinafter Government-Contractor Teambuilding].

968. U.S. Dep't of Defense, Dir. 5500.7-R, Joint Ethics Regulation (30 Aug. 1993) [hereinafter DOD Dir. 5500.7-R].

969. The guidance also discusses misuse of government position, endorsements, support for non-federal entities, travel and transportation, and training. In each of the sections, the guidance begins with a general discussion, followed by a statement of the rules for DOD employees and helpful examples. Government-Contractor Teambuilding, *supra* note 967, at 1-2.

970. 43 Fed. Cl. 227 (1999).

971. *Id.* at 231.

972. *Id.* at 232.

973. *Id.*

award because it offered a lower price. Moreover, the contracting officer told DGS of the IRS discussions with MGM about the overall price range and that MGM was on the lower end of the competitive range.[974] Subsequently, DGS protested, alleging that the IRS violated the PIA.[975]

The COFC held that the contracting officer did not violate the PIA.[976] The court concluded that the contracting officer could take reasonable, remedial actions to ensure a fair and impartial competition. Relying on prior decisions from the GAO,[977] the COFC ruled that DGS would have obtained a competitive advantage if the contracting officer had not shared the price range standings with all the offerors. Specifically, the COFC noted that DGS requested and received a debriefing where it learned of its price ranking in relation to MGM. As a result, the contracting officer leveled the playing field when it informed all offerors that they were in either the high or low end of the competitive range.[978]

Organizational Conflicts of Interest

A recurring challenge for contracting officers is finding and mitigating organizational conflicts of interest.[979] Two interesting cases highlighting the tricky nature of organizational conflicts of interest are *SSR Engineers, Inc.*[980] and *RMG Systems, Ltd.*[981]

Know the Cost, Know the Work, No Contract

In *SSR Engineers, Inc.*, the Navy awarded SSR an architect-engineering (A&E) contract to develop a master plan for replacing overhead electrical and cable lines with underground lines at Keesler Air Force Base, Mississippi. In its master plan, SSR had calculated the cost estimates the Navy used for the Keesler procurement. The Navy used SSR's master plan from the A&E contract as the statement of work for a follow-on procurement to implement changes to Keesler's electrical distribution system. The contracting officer informed SSR that it could not participate in the Keesler procurement because its work on the master plan created an organizational conflict of interest.[982] SSR protested, claiming that it had not gained an unfair competitive advantage from its prior work.[983] Looking at the "undisputed facts," the GAO disagreed. The GAO found that SSR's master plan formed the basis for the current statement of

974. *Id.* at 233. According to the COFC, the contracting officer sent DGS a written debriefing where it informed DGS that the IRS evaluated it and MGM as technically equal. After reviewing the written debriefing, DGS requested an oral clarification from the contracting officer. During a telephone conversation with IRS officials, DGS learned of the IRS's discussions with MGM about the overall price range. *Id.*

975. *Id.* Initially, DGS sought a temporary restraining order (TRO) and preliminary injunction. During a 25 November 1998 telephone conversation with the parties, the IRS informed the court that it would delay contract performance until 15 February 1999. The COFC ruled that DGS's motion for a TRO and preliminary injunction was moot. Both DGS and the IRS filed motions for summary judgment. In its motion, the IRS claimed that it engaged in discussions with MGM to make the procurement process fair. *Id.*

976. *Id.* at 242. In reaching its decision, the COFC agreed that the PIA protected the limited price information as source selection information. The COFC disagreed, however, with DGS' claim that source selection information may never be disclosed during the procurement process. Instead, the COFC noted that a contracting officer is authorized to disclose source selection information under certain circumstances, such as a debriefing. *See id.* at 236. *See also* FAR, *supra* note 17, at 3.104-5, 15.506(d). On this issue, the COFC agreed that DGS properly received the information as part of a debriefing. The real dispute, according to the COFC, rested on whether the PIA permitted the contracting officer to disclose the limited price range information to all offerors after the IRS reopened negotiations. *DGS*, 43 Fed. Cl. at 236.

977. *Id.* at 238 (citing KPMG Peat Marwick, B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ 272)). The COFC deferred to the Comptroller General's unique knowledge: "While the decisions of the Comptroller General are not binding, the court recognizes that the General Accounting Office has special expertise in this area, and its decisions may provide useful guidance to the court." *Id.*

978. *Id.* In addition, the COFC concluded that the contracting officer exercised her discretion in good faith. All parties agreed that the contracting officer reopened negotiations properly under the circumstances. *Id.*

979. FAR, *supra* note 17, subpt. 9.5.

980. B-282244, 1999 U.S. Comp. Gen. LEXIS 139 (June 18, 1999).

981. B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153. In 1999, the GAO issued another organizational conflict of interest case in the competitive sourcing area. *See* DZS/Baker, LLC, B-281224, Jan. 12, 1999, 99-1, CPD ¶ 19.

982. *SSR Eng'rs*, 1999 U.S. Comp. Gen. LEXIS 139, at *3. The contracting officer relied on FAR Subpart 9.5, which requires contracting officers to avoid, neutralize, or mitigate potential organizational conflicts of interest. *See* FAR, *supra* note 17, at 9.505. In addition, the FAR addresses scenarios where a firm writes the statement of work or the specifications:

> If a contractor prepares, or assists in preparing, a work statement to be used competitively acquiring a system or services–or provides materials leading directly, predictably, and without delay to such a work statement–that contractor may not supply the system, major subcomponents of the system or the services unless: (i) It is the sole source; (ii) It has participated in the development and design work; or (iii) more than one contractor has been involved in preparing the work statement.

Id. at 9.505-2(b)(1).

work and for the Navy's cost estimates on the procurement.[984] Thus, the contracting officer had sufficient grounds to exclude SSR from the Keesler procurement because it had gained an unfair competitive advantage.

Oh, Say Can You Mitigate?

In *RMG Systems, Inc*., the Army awarded (on behalf of the MTMC) a contract to Consolidated Safety Services (CSS) to conduct safety inspections of carriers approved to do business with the DOD. RMG protested, claiming that CSS had conflicts of interest that would impact its contract performance. For example, CSS had performed safety inspections for Landstar Systems, the holding company for several DOD-approved carriers. Additionally, CSS was affiliated with the International Motor Carrier Audit Commission (IMCAC), a private organization that performed the same type of safety inspections for DOD-approved carriers under the Army's MTMC contract. In both instances, CSS proposed a plan to mitigate the conflicts of interest. For example, CSS offered to discontinue business with Landstar Systems, while IMCAC agreed to discontinue business with present and future DOD-approved carriers during CSS's tenure under the contract. The contracting officer accepted CSS's mitigation plan, concluding that it eliminated the conflicts of interest.[985] The GAO agreed and reasoned that CSS had no more than a "remote, theoretical possibility" of a conflict of interest.[986]

Foreign Military Sales

Limiting Competition Is Permissible

In *Electro Design Manufacturing*,[987] the Army requested proposals for the two primary components of the TOW 2 missile launcher system,[988] in connection with a foreign military sales (FMS) procurement for the government of Taiwan. The Army conducted the procurement under the Arms Export Control Act,[989] which authorizes the DOD to enter into contracts for resale to foreign countries or international organizations. The protestor asserted that combining the two system components into a single acquisition restricted competition improperly in violation of both the CICA and the Small Business Act.

In its decision, the GAO discussed the CICA's general mandate for full and open competition. One of the statutory exemptions to this rule, however, is procurements executed upon the written instructions of a foreign government reimbursing the agency's procurement costs.[990] This statutory provision authorizes an agency to conduct a sole-source acquisition upon an FMS customer's written request.[991] Any less restrictive procedures–here, the consolidation of requirements into a single acquisition–still done upon an FMS customer's request are no less permissible.[992] Further, as the FMS customer had requested that the agency conduct the procurement as a single acquisition, the situation fell outside of the SBA's limits on the consolidation of contract requirements.[993]

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983. *SSR Eng'rs*, 1999 U.S. Comp. Gen. LEXIS 139, at *5. SSR first argued that FAR Subpart 9.5 did not apply to architect-engineer contracts because the latter are governed by FAR Part 36. According to SSR, the more specific provisions of FAR Part 36 do not exclude firms developing the statement or work from the later design-build team. Second, SSR argued that it had not gained an unfair competitive advantage. Rather, other contractors vied for SSR on their design-build team because of its design expertise, not its competitive advantage. The GAO dismissed these arguments, finding no basis to object to the contracting officer's decision. *Id.* at *7.

984. *Id.* at *7.

985. *RMG Sys*., 98-2 CPD ¶ 153 at 3.

986. *Id.* at 6. Specifically, the GAO found that CSS did not have a financial interest in performing the MTMC inspections. Neither CSS nor IMCAC would review the other's work, which eliminated the chance that CSS would tailor its inspection to match the results of an IMCAC inspection. Moreover, CSS had no reason to favor or promote the IMCAC inspections because carriers paid IMCAC a one-time $300 fee. Thus, CSS had no incentive to favor IMCAC carriers. *Id*.

987. B-280953, Dec. 11, 1998, 98-2 CPD ¶ 142.

988. The TOW (tube-launched, optically-guided, wire-tracked) is a crew-served antitank missile system. DEP'T OF ARMY, WEAPONS SYSTEMS 1999, 202-3 (1999) [hereinafter WEAPONS SYSTEMS 1999]. The TOW's two primary components are the launcher and the night vision sight equipment. *Electro Design*, 98-2 CPD ¶ 142 at 2.

989. 22 U.S.C.A. §§ 2751-2796d (West 1999).

990. *Electro Design*, 98-2 CPD ¶ 142 at 3. Specifically, the CICA permits the government to use noncompetitive procedures when:

> [T]he terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures.

10 U.S.C.A. § 2304(c)(4) (West 1999).

991. *Electro Design*, 98-2 CPD ¶ 142 at 3 (citing Goddard Indus., B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104 at 2).

992. *Id.*

FMS Contracts Do Not Require Cost or Pricing Data

On 14 September 1999, the DOD amended the DFARS provisions relating to the pricing of FMS contracts.[994] As amended, DFARS 225.7303, "Pricing acquisitions for FMS," now bars contracting officers from requiring contractors to submit cost or pricing data if the foreign government obtained adequate price competition in conducting the FMS procurement.[995] The amended regulation directs contracting officers to consult with the foreign government through security assistance personnel to determine if adequate price competition has occurred.[996] This change negates a preexisting requirement that contracting officers price FMS contracts using the same provisions applicable to pricing other defense contracts (for example, FAR Parts 15 and 31).[997]

The Freedom of Information Act

In a terse, reverse-FOIA decision rejecting a long-standing federal agency disclosure practice, the District of Columbia Circuit Court of Appeals declared NASA's proposed release of contract line item prices to be both "arbitrary and capricious" and "not in accordance with law."[998] Eschewing an opportunity to clarify whether contract unit prices qualify as "voluntary submissions" under the D.C. Circuit's more protective *Critical Mass* test,[999] the court held that these prices were protected as "required submissions" under its *National Parks* "substantial competitive harm" test.[1000] Characterizing NASA's reasons for disclosure as "silly," "convoluted," and "astonishing," the court found McDonnell Douglas's position to be "indisputable."[1001] The court's failure to mention, let alone distinguish, the appellate decisions upholding agency determinations to disclose unit prices[1002] casts a veil of confusion over this area of the law.

The National Aeronautics and Space Administration petitioned for rehearing en banc, which was denied with only a concurring opinion by Judge Lawrence Silberman, author of the panel opinion.[1003] In the concurring opinion, which compounded the confusion, Judge Silberman stated that "the government is now overreading our opinion to hold that government disclosure of line item pricing would invariably

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993. *Id.*

994. 64 Fed. Reg. 49,683 (1999).

995. DFARS, *supra* note 190, at 225.7303(b). The impetus for this regulatory change was policy guidance issued by Director of Defense Procurement Eleanor R. Spector on 13 July 1999. Memorandum, Under Secretary of Defense (Procurement), to Secretaries of the Military Departments, subject: Pricing Issues in Foreign Military Sales Contracts (13 July 1999) *available at* <http://www.acq.osd.mil/dp/fmspricing.pdf> [hereinafter Spector Memorandum]. Writing to defense acquisition executives, Mrs. Spector noted:

> [I]n today's global marketplace, there is significant competition for sales of military equipment, with U.S. systems competing against foreign systems and other U.S. systems . . . to meet foreign government's requirements. In these situations, competitions run by foreign governments should determine the price to be paid. This is true even if the sale to the foreign government is then processed as a foreign military sale and even if DoD is buying the same item sole source.

Id.

996. DFARS, *supra* note 190, at 225.7303. *See* Spector Memorandum, *supra* note 995 ("If so, this meets the requirement of FAR 15.403-1(b)(1), which states that the submission of certified cost or pricing data shall not be required when the contract price is based on adequate price competition.").

997. DFARS, *supra* note 190, at 225.7303.

998. McDonnell Douglas Corp. v. National Aeronautics and Space Admin., 180 F.3d 303, 307 (D.C. Cir. 1999).

999. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992). Under the *Critical Mass* test, "voluntarily" provided commercial information is "confidential" and exempt from disclosure if "it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id*. at 878 (quoting Sterling Douglas, Inc. v. FTC, 450 F.2d 698,709 (D.C. Cir. 1971)). Generally, this standard is more protective of commercial or financial information because courts are willing to rely on the submitter's assertions of customary nonrelease to the public.

1000. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). In *National Parks*, the Court of Appeals for the District of Columbia articulated a two-part definition of "confidential" information. For commercial or financial records required by the government, Exemption 4 allowed withholding of confidential information if disclosure either "(1) impair[ed] the Government's ability to obtain necessary information in the future; or (2) [the disclosure would] cause substantial harm to the competitive position of the person from whom the information was obtained." *Id*. The *National Parks* test historically has provided less protection to commercial or financial records because of the difficulty submitters have in establishing "substantial competitive harm."

1001. *McDonnell Douglas*, 180 F.3d at 306-07. McDonnell Douglas argued that it would suffer substantial competitive harm from disclosure because its non-government customers "could bargain down ('ratchet down') its prices more effectively" and that disclosure "would help its domestic and international competitors to underbid it." *Id*.

1002. Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990); Acumenics Research & Tech., Inc. v. United States Dep't of Justice, 843 F.2d 800, 808 (4th Cir. 1988).

1003. McDonnell Douglas Corp. v. National Aeronautics and Space Admin., No. 98-5251 (D.C. Cir. Oct. 6, 1999).

violate the Trade Secrets Act. We do not so hold; only that the agency's explanation of its position bordered on the ridiculous."[1004]

This case arose before the effective date of a recent FAR change that mandates public disclosure of unit prices in awarded government contracts.[1005] Thus, neither NASA nor the court addressed this aspect of the FAR. Agencies should therefore continue to disclose unit prices, in reliance on the FAR's legal authorization to do so, in contracts solicited after 1 January 1998.[1006]

Multiple Award Schedules

"Incidentals" a Thing of the Past

The GAO, in sustaining the protest of *Pyxis Corp*.,[1007] held that the Army improperly included non-Federal Supply Schedule (FSS)[1008] items in a delivery order placed under a FSS contract. In *Pyxis*, the Army issued a delivery order to OmniCell Technologies for automated medication and supply dispensing equipment and software for three medical centers. The Army had compared the product information of both Pyxis and OmniCell and decided that OmniCell best satisfied the Army's needs. Pyxis filed a protest, contesting the Army's decision to issue the delivery orders to OmniCell.[1009]

After filing its protest with the GAO, however, Pyxis also discovered that the OmniCell orders included six non-FSS items valued in excess of $180,000.[1010] Sixteen days after receipt of the Army's administrative report, Pyxis protested the Army's ordering of non-FSS items.[1011] Despite the tardiness of the supplemental protest, the GAO invoked the "significant issue" exception to its timeliness rules for two reasons.[1012] First, the GAO believed that the procurement community was interested in the issue of including non-FSS orders with a FSS buy.[1013] Second, the GAO wanted to resolve the conflicting views of the GAO and the COFC on the issue.

Before its decision in *Pyxis*, the GAO had allowed an agency to merge–under one FSS procurement–the purchase of FSS goods with the purchase of non-FSS items "incidental" to the FSS goods. Such a buy was proper if it was the lowest aggregate price and the cost of the non-FSS items was small compared to the costs of the total procurement.[1014] In a similar

1004. *Id.* Although that observation would suggest that the panel limited its opinion to the agency's administrative record, Judge Silberman ignored the court's strict interpretation of "competitive harm" when he declared that:

> I simply do not understand how the government can continue to argue that information that damages a supplier's relationship–or bargaining power–with customers does not cause it competitive harm. Other than in a monopoly situation anything that undermines a supplier's relationship with its customers must necessarily aid its competitors.

Id.

1005. *See* FAR, *supra* note 17, at 15.503(b)(iv), 15.506(d)(2).

1006. *See 1997 Year in Review*, *supra* note 3, at 82 (discussing that submitter notice need not be given to successful offeror before determining to disclose unit prices in response to FOIA request).

1007. Pyxis Corp., B-282469, July 15, 1999, 99-2 CPD ¶ 18.

1008. The FSS program allows federal agencies to obtain commonly used commercial items at prices associated with volume buying. The GSA establishes indefinite delivery contracts with commercial firms for items at stated prices for given periods of time. *See* FAR, *supra* note 17, at 8.401(a). As a result, agencies need not concern themselves with competition requirements when ordering off of a FSS, since GSA has already determined the prices of a FSS contractor to be fair and reasonable. *Id*.

1009. The GAO reviewed the Army's delivery order decision by applying the standards set out at FAR 8.404(a)-(b)(2), which requires an agency to ensure the selection meets its needs by considering reasonably available information about the supply or service. The GAO found the Army acted reasonably by placing its orders with OmniCell. *Pyxis Corp*., 99-2 CPD ¶ 18 at 4.

1010. *Id.* at 2-3. The Army included the three delivery orders in its administrative report. *Id*.

1011. Under its rules, the GAO found that the supplemental protest was untimely. *See Pyxis Corp*., 99-2 CPD ¶ 18 at 3. A protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, about the issue. 4 C.F.R. § 21.2(a)(2) (1999).

1012. 4 C.F.R. § 21.2(c) (1999) ("GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely issue.").

1013. Indeed, the Army's purchase of non-FSS items in this manner is not unique. The GSBCA recently resolved a claim by GSA for overcharges against a FSS contractor. The board held that the agency was entitled a portion of its claim because under the contract, both mandatory and non-mandatory users were entitled to discounts. The board did not allow for discounts on invoice items that were not on the contractor's schedule and commented "How federal agencies came to purchase non-schedule items from a schedule contractor presents an intriguing question of contract administration." Photon Tech. Int'l, Inc., GSBCA 14918, 99-2 BCA ¶ 30,456.

1014. *See* ViON Corp., B-275063.2, B-275069.2, Feb. 4, 1997, 97-1 CPD ¶ 53.

situation, however, the COFC had noted that the CICA required full and open competition unless an exception applies.[1015] Finding no exception existed for "incidental" or "insignificant" purchases, the COFC concluded that it was improper to buy non-FSS items through a FSS delivery order.[1016]

In *Pyxis*, the GAO reversed course. It adopted the COFC's analysis in *ATA Defense Industries* and sustained the protest of Pyxis,[1017] having been "persuaded, in light of the analysis of the court in ATA, that there is no statutory authority for the 'incidentals' test enunciated in ViON."[1018] Because all of the non-FSS items were above the micro-purchase threshold of $2500, the agency should have followed applicable procurement regulations[1019] to buy the items.

FSS Contractors Not Entitled to Damages for Off Schedule Orders[1020]

Six companies, arguing a diversion theory,[1021] sought approximately $7.5 million in lost profits and consequential damages under their mandatory GSA multiple award schedule contracts for court reporting services. The contractors and the GSA stipulated that during the performance periods, the government contracted off-schedule for court reporting services totaling more than 3.7 million original pages. The parties also stipulated as to lost copy sales and page prices.

The GSBCA held for the government, finding that the ordering of services off-schedule did not entitle the contractors to either lost profits or consequential damages. Despite the stipulation of the parties that the contractors had "requirements" contracts, the board analyzed the terms of the contract to determine whether a compensable breach had occurred. The board noted that the government did not obligate itself to order all of its needs from any single contractor (as would be the case in a requirements contract), and did not obligate itself to order any amount from any contractor.[1022] The GSBCA then concluded that the contracts held by the companies were "analytically most akin to indefinite quantity contracts with no stated mandatory minimum, enforceable to the extent they were performed."[1023] Because such contracts provided the contractors no remedy for off-schedule orders, the board denied the appeals.

Proposed Rule Encourages FSS Orders to Small Businesses[1024]

According to GSA statistics, seventy percent of FSS contractors are small business concerns.[1025] In FY 1998, small business concerns accounted for thirty-three percent of total schedule sales.[1026] A proposed amendment to the FAR would encourage placement of FSS orders with small businesses. The proposal directs agencies, when conducting evaluations and before placing an order against a FSS, to consider including, if available, one or more small, small women-owned, or small disadvantaged business schedule contractors.[1027] The rule also would allow agencies to credit such orders toward their small business goals.

1015. ATA Defense Indus., Inc. v. United States, 38 Fed. Cl. 489, 503 (1997).

1016. *Id.* at 503 (requiring termination of a purchase order where 35% of the order consisted of non-FSS items).

1017. Because the items had already been delivered to the Army and the protest issue had not been timely raised, the GAO recommended that the Army reimburse Pyxis for the costs of preparing its product submission. *See Pyxis Corp.*, 99-2 CPD ¶ 18 at 4-5.

1018. *Id.* at 3.

1019. If using simplified acquisition procedures, the Army would have had to obtain competition to the "maximum extent practicable." *See* FAR, *supra* note 17, at 13.104. Otherwise, the competition requirements of FAR part 6 would apply.

1020. Ace-Federal Reporters, Inc., GSBCA No. 13298, 99-1 BCA ¶ 30,139.

1021. *Id.* The contractors claimed that the ordering by user agencies of court reporting services from non-schedule contractors was an improper "diversion" of work, and constituted a government breach of their respective contracts.

1022. *Ace-Federal*, 99-1 BCA ¶ 30,139 at 149,109. The board refused to consider the contracts collectively, as urged by the six appellants: "Appellants' efforts to operate as a consortium of disappointed vendors claiming breach damages based upon a diversion of the potential universe of work divided proportionately among them must fail. The contracts were not collective endeavors–each contractor separately and individually offered to provide services at different, independent prices." *Id.*

1023. Interestingly, the board did not find that the contracts were indefinite-quantity contracts with no stated minimum (which would render the contract unenforceable), but only "analytically most akin to" such a contract. *Id.* at 149,109.

1024. 64 Fed. Reg. 49,948 (1999).

1025. *Id.*

1026. *Id.*

Payment and Collection

Proposed Changes to Contract Financing Procedures

On 10 February 1999, the FAR Council proposed changes to contract financing procedures and policies.[1028] Among the proposed changes are elimination of the "paid cost rule," a raised threshold for providing financing to large businesses, and a stated preference for performance-based payments.

Under current progress payment procedures, a large business must have paid its subcontractor before including that subcontractor in a progress payment billing to the government. This is referred to as the "paid cost rule." The proposed revision to FAR clause 52.232-16 would allow a prime contractor to bill for subcontract costs incurred but not yet paid, as long as it will pay the subcontractor in the ordinary course of business. The Director of Defense Procurement has issued guidance for eliminating the paid cost rule from existing contracts.[1029]

The proposed changes also would increase the threshold for using contract financing for large businesses from $1 million to $2 million. For small businesses, financing will remain available for contracts in excess of the simplified acquisition threshold. Finally, the Council also proposed making performance-based payments the preferred method of contract financing. Contracting officers will be required to deem such financing impracticable before using customary progress payments. The use of performance-based payments will be authorized for research and development contracts, and contracts awarded through competitive negotiation procedures.

Proposed Rule Changes for Purchase Card Usage

Recognizing the efficiencies commensurate with purchase card payments, the DOD has taken steps to increase card usage. The first rule would require use of the card to pay for micropurchases unless an exception is authorized.[1030] A second rule authorizes use of the card up to $25,000 for foreign purchased items that will be used outside the United States.[1031]

The GAO and Congress Continue Push to Improve the DOD's Accounting Practices

Continuing a long line of reports criticizing the DOD's financial management practices, the GAO issued a report in January concerning the Navy's matching of disbursements to obligations.[1032] Stating that the "Navy's inability to accurately account for its disbursements and collections is a serious, long-standing financial problem," the GAO focused on the problem of "in-transits."[1033] The Navy describes a problem "in-transit" as a disbursement transaction matched to an appropriation, but not matched to an obligation recorded against the appropriation within 120 days of the transaction. The Navy had $3.6 billion in problem in-transits as of October 1997, according to the DFAS.[1034]

The GAO declared that the existence of problem disbursements may lead to fraudulent or erroneous payments, violations of the Antideficiency Act, and inaccurate and unreliable financial reporting.[1035] The GAO recommended that the DOD change its "problem disbursement policies and procedures to ensure the Navy's funds control system maintains, on an ongoing and current basis, accurate and reliable unobligated and unexpended balances in expired and canceled accounts."[1036]

To place more controls on the DOD's policies, Senator Charles Grassley offered an amendment to the FY 2000 Appropriations Bill, lowering the threshold (from $1 million to $500,000) for matching a specific payment to its corresponding contract and funding account.[1037] Senator Grassley stated, "My efforts are about sound business practices: don't pay out one penny until proof can be shown that the goods and services were ordered and, in fact, received."[1038]

1027. *Id.*

1028. *Id*. at 6758.

1029. The Director recommends using Single Process Initiative Procedures to reach equitable agreements with affected contractors. *See* Memorandum, Director, Defense Procurement, to Defense Contract Management Command, subject: Elimination of the Paid Cost Rule (23 Sept. 1999).

1030. 64 Fed. Reg. 38,878 (1999). The exceptions will be listed at DFARS 213.270.

1031. 64 Fed. Reg. 28,134.

1032. General Accounting Office, Financial Management: Problems in Accounting for Navy Transactions Impair Funds Control and Financial Reporting, Rep. No. GAO/AIMD-99-19 (Jan. 19, 1999).

1033. *Id.* at 1.

1034. *Id.* at 2.

1035. *Id.* at 1.

1036. *Id*. at 15.

Reform Urged for Prompt Payment Act (PPA)[1039]

In testimony before the House Government Reform Subcommittee on National Security, Veterans Affairs, and International Relations, private and government representatives advocated changes to the PPA.[1040] The PPA requires the government to pay interest in certain cases of late payments.

The industry representatives advocated service contract coverage under the PPA. The PPA does not apply to contract financing payments, such as advance and progress payments. Two industry representatives, testifying on behalf of professional and technical services contractors, described problems faced by contractors due to late receipt of financing payments. Contractors are forced to find other forms of financing to plug the gaps created by late government payments. Because the cost of financing interest is an unallowable cost, this is an "unfair hardship on contractors."[1041]

The government also sought changes to the PPA. Current PPA policy is to pay all interest payments of $1 or more. The Director of DFAS, Thomas Bloom, joined by the GAO's David Cooper, recommended raising the interest threshold to $25.[1042] Such a change would allow DFAS employees to work on higher priority tasks.[1043]

Advance Payments Clause Gives Government Paramount Lien on Purchased Equipment[1044]

Johnson Management Group (JMG) and the HUD entered into a contract for management and lawn maintenance services for single family properties. The HUD provided JMG advance payments, in a special bank account, for the purchase of start-up equipment. In addition to incorporating into the contract the Advance Payments clause,[1045] the contracting officer stated in Contract Modification Number 1 that "HUD has a lien on the items purchased until the advance payment(s) [are] liquidated, which should be in a matter of days."[1046] Several days after executing the contract modification, the contracting officer sent a memorandum to JMG advising that the advance payments would be liquidated upon their use to purchase the start-up equipment. The HUD terminated JMG's contract for default and refused to pay JMG's invoices pending return of, or payment for, the start-up equipment purchased with the advance payments. JMG appealed both issues to the HUD Board of Contract Appeals.

Not surprisingly, JMG used the language in Modification Number 1 and the subsequent contracting officer memorandum to support its position that the advance payments had been liquidated upon their use to purchase the equipment. JMG argued that the government had no property interest in the start-up equipment. The contracting officer testified that she had no previous experience with advance payments and was confused as to what "liquidated" meant.

Referring to the Advance Payments clause, the board ruled that JMG owned the start-up equipment subject to the government's paramount lien.[1047] The board also held that the contracting officer lacked authority to liquidate advance payments upon their withdrawal and expenditure. Under the Advance Payments clause, the government was entitled to actual repayment or discharge of the debt and could pursue any of the liquidation measures listed in the clause.[1048] The board upheld the termination and found JMG entitled to payment of some of its

1037. *Defense: Senate Again Reduces DOD Threshold for Matching Payments to Specific Accounts*, Fed. Cont. Daily (BNA) (June 3, 1999), *available in* LEXIS News Library, BNAFCD file.

1038. *Id.*

1039. 31 U.S.C.A. § 3901 (West 1999).

1040. *Prompt Payment: Service Contractors Urge House Panel to Provide Prompt Payment Act Coverage*, Fed. Cont. Daily (BNA) (June 24, 1999), *available in* LEXIS News Library, BNAFCD file.

1041. *Id.*

1042. *Id.* Interest payments up to $25 account for half of all interest payments, but less than two percent of all interest dollars.

1043. *Id.* The DOD states that it takes 45 minutes to process an interest payment.

1044. Johnson Management Group CFC Inc., HUDBCA Nos. 96-C-132-C15, 97-C-109-C2, 1999 HUD BCA LEXIS 7 (1999).

1045. FAR, *supra* note 17, at 52.232-12. The clause provides the government with a paramount lien on supplies, property, and material acquired for the contract. *Id.* at 52.232-12(i).

1046. *Johnson Management Group*, 1999 HUD BCA LEXIS 7, at *3.

1047. *Id.* at *23. The board referred to the government property clause at FAR 52.245-2, and concluded that JMG's purchase of start-up equipment did not result in the government obtaining an ownership interest.

1048. *Johnson Management*, HUD BCA LEXIS 7, at *26. *See* Do-Well Machine Shop, Inc., ASBCA Nos. 34565, 40895, 99-1 BCA ¶ 30,320 (finding SBA entitled to unliquidated advance payment made to the defaulted subcontractor).

invoiced services, to be offset against the unliquidated balance of advance payments.

Procurement Fraud

Government Cannot Stop a Whistleblower's Retaliation Claim or Share the Proceeds of the Settlement

On 2 March 1999, the District Court for the Eastern District of Virginia held that a qui tam relator may settle his retaliation claim under the FCA.[1049] Additionally, the court concluded that the government does not have a statutory right to share the relator's proceeds from the settlement.[1050]

Kenneth Summit, the relator, filed a qui tam suit against his employer, Michael Baker Corporation (MBC), under the FCA.[1051] In the qui tam suit, the relator filed the FCA charges along with his private claim of retaliation for wrongful discharge.[1052] The Department of Justice (DOJ) decided the case lacked merit and declined to prosecute. During the discovery stage, Mr. Summit reached the same conclusion and decided to drop the FCA charges and settle the retaliation claim.[1053] The DOJ, however, objected and claimed that the government must approve the dismissal in writing before the court can dismiss a qui tam action. The court agreed and denied the relator's motion for voluntary dismissal.[1054]

Despite the favorable ruling that prevented the relator from dismissing the qui tam case voluntarily, the DOJ made no effort to prosecute the case.[1055] Thus, on 5 February 1999, the relator and the defendant informed the court that they had settled the whistleblower retaliation claim and moved to dismiss that charge.[1056] The DOJ, however, opposed the settlement and demanded the government's statutory share.[1057] At the same time, the DOJ moved to dismiss the FCA charges.[1058] The DOJ claimed that the settlement was improper because it precluded the relator from pursuing any action arising from the same facts as the original qui tam action. The DOJ contended that the relator could not execute the settlement agreement because the terms of the settlement included the FCA claims aspect.

In rejecting the government's case, the DOJ relied on a Fifth Circuit Court of Appeals decision holding that the language of the 31 U.S.C. § 3730(b)(1)[1059] gave the government absolute veto power over voluntary settlements in FCA qui tam suits.[1060] The district court, however, concluded that the Fifth Circuit case did not apply.[1061] Instead, the court looked to the holdings in *Childree v. UAP/GA AG CHEM, Inc.*,[1062] and *Neal v. Honeywell, Inc.*[1063] In both *Childree* and *Neal*, the courts held that a

1049. 31 U.S.C.A. § 3729 (West 1999).

1050. United States *ex rel.* Summit v. Michael Baker Corp., 40 F. Supp. 2d 772 (E.D. Va. 1999).

1051. 31 U.S.C.A. § 3729. The statute provides for a civil penalty between $5000 and $10,000, plus treble damages, for making false claims against the U.S. government. *Id*.

1052. 31 U.S.C.A § 3730(h). This statute provides for compensatory damages for wrongful discharge in retaliation of the employee's actions. *Id*.

1053. *Summit*, 40 F. Supp. 2d at 773.

1054. *Id*. *See* 31 U.S.C.A. § 3730(b)(1) ("[A]n action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.").

1055. *Summit*, 40 F. Supp. 2d at 775. The district court remarked that "the Government has tied the relator's hands behind his back, not allowing him to settle the claims or to dismiss the claims, yet refusing to proceed with the claims on its own." *Id*.

1056. *Id*. at 774. The terms of the settlement included a one-year salary plus interest (minus the yearly tax withholdings) and the relator's attorney fees. *Id.*

1057. *Id*. The government is entitled to 70% to 75% of a relator's settlement proceeds.

1058. *See* 31 U.S.C.A. § 3730(d)(2). The statute states:

> If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25% and not more than 30% of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

Id.

1059. 31 U.S.C.A. § 3730(b)(1). The statute provides, in part, that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Id.*

1060. Searcy v. Philips Elecs. North America Corp., 117 F.3d 154 (5th Cir. 1997). The rationale for keeping such a tight control on the settlement authority is due primarily to the fear that relators may manipulate the settlements to reduce the benefits of the government and increase their own monetary awards. *Summit*, 40 F. Supp. 2d at 774.

relator may still recover based on its retaliation claim, even if the underlying qui tam case is not filed or is unsuccessful. The district court consequently held that Mr. Summit's retaliation claim was a private right of action separate from the FCA charges in the qui tam suit.[1064] Moreover, the district court held that "under [the retaliation claim], the Government would not have a right to any amounts that were awarded to the relator, as it becomes solely a private suit by the relator against the defendants."[1065]

Third Circuit Holds FOIA Disclosure is a Public Disclosure

In *Mistick PBT v. Housing Authority for the City of Pittsburgh*,[1066] the Third Circuit Court of Appeals affirmed a district court's holding that qui tam suits under the FCA may not be based upon information the relator obtained through a FOIA[1067] request. Mistick, the qui tam plaintiff, contracted with the Housing Authority for the City of Pittsburgh (HACP) to renovate the Bedford and Addison housing projects.[1068] When Mistick submitted its bid for the projects, the contract required it to abate the lead in the original paint by painting over the existing paint with an encapsulant (Glid-Wall) manufactured by the Glidden Painting Company.[1069]

Shortly after beginning the renovation project, Mistick encountered several delays because of an issue involving the Glid-Wall encapsulant. The HACP discovered that the Glidden Paint Company refused to guarantee that Glid-Wall would abate the lead in the original paint. While the parties were deciding on the proper encapsulant, Mistick waited and then sued the HACP for delay damages in state court.

As part of its investigation, Mistick submitted a FOIA request to the Housing and Urban Development Agency (HUD) and received several files containing correspondence between the HACP, Astorino,[1070] and HUD. Based on the information it received from the FOIA request, Mistick filed a qui tam suit in the U.S. District Court for the Western District of Pennsylvania.[1071] The HACP moved to dismiss, arguing that Mistick was not an original source.[1072] The district court agreed and held that it lacked jurisdiction because Mistick based its suit on information obtained through a FOIA request. Mistick then appealed to the Third Circuit.[1073]

On appeal, Mistick acknowledged that it had received the pertinent information pursuant to a FOIA request and from discovery in its state court suit against the HACP. Mistick nevertheless argued that the FCA does not cover information obtained through the FOIA request and does not trigger the statutory jurisdictional bar for filing a qui tam suit.

At issue before the Third Circuit was the specific definition of "public disclosure" under 31 U.S.C. § 3730(e)(4)(A).[1074] The Third Circuit held that this provision bars FCA suits based upon publicly-disclosed information unless the plaintiff is the attor-

1061. *Summit*, 40 F. Supp. 2d at 774-75. The district court noted that the relator attempted to settle both the FCA charges and the retaliation claims in *Searcy*, whereas the relator attempted to settle only the retaliation claim in the present case. *Id.*

1062. 92 F.3d 1140 (11th Cir. 1996).

1063. 33 F.3d 860 (7th Cir. 1994).

1064. *Summit*, 40 F. Supp. 2d at 775. The district court concluded that the DOJ could continue with the prosecution on its own, despite the general release of claims the relator provided in the settlement agreement. Furthermore, if the district court allowed the DOJ to dismiss all charges, except for the retaliation claim, the government would be left with only the relator's private right of action pursuant to the retaliation discharge. The district court had already concluded that the proceeds from this action would belong to the relator as compensation for wrongful discharge. Relying on the holdings reached in *Childree* and *Neal*, the district court ruled for the relator and denied the DOJ a share of the settlement proceeds. *Id*.

1065. *Id*. at 776.

1066. 186 F.3d 376 (3d Cir. 1999).

1067. 5 U.S.C.A § 552(a) (West 1999).

1068. *Mistick PBT*, 186 F.3d at 379. Both Hudson and Addition were Housing and Urban Development projects. *Id*.

1069. *Id*. Glid-Wall is an encapsulant manufactured by Glidden Paint Company. In 1988, however, the Glidden Paint Company notified Astorino and the HACP that it no longer recommended using Glid-Wall as an encapsulant to perform lead-based paint abatement *Id*.

1070. *Id*. Astorino was the architectural firm that developed the specifications for the lead-based paint abatement work. *Id.*

1071. *Id*. at 381-82. Mistick alleged that the HACP used contract specifications that called for a product the agency knew was no longer recommended for covering the lead-based paint, and then made misrepresentations in requesting additional funds from HUD to cover the cost of switching to another product. *Id.* Mistick PBT v. Housing Authority for the City of Pittsburgh, D.C. No. 95-cv-01876 (W.D. Pa. 1997).

1072. 31 U.S.C.A. § 3730(e)(4)(B) (West 1999) defines an "original source" as "an individual who has direct and independent knowledge of information on which a qui tam action is based and has voluntarily provided the information to the Government before filing the action." *Id*.

1073. *Mistick PBT*, 186 F.3d at 382.

ney general or an "original source" of the information. Because Mistick learned of the alleged false claims through its FOIA request, it was not an original source of the information and 31 U.S.C. § 3730(e)(4)(A) barred its qui tam suit.[1075]

Can a County Be a Proper Defendant Under the FCA?

This past year, courts have wrestled with the question of whether a state or county is a proper defendant in a qui tam suit under the FCA. In *United States* ex rel. *Chandler v. Hektoen Institute*,[1076] the U.S. District Court for the Northern District of Illinois held that a county falls within the definition of a person under the FCA.[1077] In this case, the National Institute of Drug Abuse (NIDA) awarded a medical research grant to the Cook County Hospital (CCH) for $5,000,000, which later transferred the administration of the grant to Hektoen Institute.[1078]

In 1993, Hektoen hired Ms. Janet Chandler as the project director on the grant. Chandler alleged that CCH and Hektoen failed to comply with the terms of the grant and federal regulations. In addition, Chandler alleged that CCH and Hektoen misrepresented the progress of the research to NIDA. When Chandler informed several doctors at CCH that the study violated the terms of the grant, the Assurance of Compliance plan,[1079] and federal regulations, the CCH and Hektoen reduced her responsibilities and took other retaliatory action against her. Hektoen fired her after Chandler and alleged additional misconduct.

Chandler filed a qui tam suit, charging that the defendants made false claims and retaliated against her illegally in violation of the FCA. The government declined to prosecute the case. Both CCH[1080] and Hektoen moved to dismiss the qui tam suit based on lack of jurisdiction, which the court denied.[1081] In addition, the CCH filed a supplemental motion to dismiss the action. The CCH argued that the court lacked jurisdiction because a county is not a "person" within the meaning of the FCA.

In determining whether the FCA construed a county as a "person," the district court looked to the legislative history of the FCA, which states that the FCA covers all parties who may submit false claims, including states and their political subdivisions.[1082] The district court denied the defendant's motion to dismiss and held that a county is a "person" within the context of the FCA.[1083] However, read on–it gets interesting!

1074. *Id*. at 383. This provision bars FCA suits based on public disclosures unless the relator was the original source of the information:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C.A. § 3730(e)(4)(A).

1075. *Mistick PBT*, 186 F.3d at 383. The Third Circuit relied on a Supreme Court case that held that information obtained through a FOIA request constituted a "public disclosure." The Third Circuit also observed that the language of the FOIA required the government to make certain information available to the public. Based on these two pieces of evidence, the Third Circuit disregarded the dissent's argument that information obtained through a FOIA request is not publicly disclosed because it is provided only to the requestor. *Id*. at 383. The majority responded that while the requestor is not required to share the results of its FOIA request, the information is accessible to anyone who requests it. *Id*. *See* Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc., 100 S. Ct. 2051 (1980). In *GTE Sylvania*, the Supreme Court's determination of public disclosure was within the context of the Consumer Products Safety Act. *See* 15 U.S.C.A. § 2055(b)(1) (West 1999). The Third Circuit's holding is in line with the Ninth Circuit's decision in *Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), where the court concluded that information obtained through a FOIA request is publicly disclosed within the meaning of the qui tam provision. *Mistick PBT*, 186 F.3d at 388. *See also* United States *ex rel*. Ali Waris v. Staff Builders, No. 96-1969, 1999 U.S. Dist. LEXIS 15427 (E.D. Pa. Oct. 4, 1999) (holding that information obtained via a FOIA request is a public disclosure).

1076. 35 F. Supp. 2d 1078 (N.D. Ill. 1999).

1077. *Id*. at 1083.

1078. *Id*. at 1079. The five million dollars were used to study the treatment of 300 drug-dependent pregnant women over a five-year period. *Id.*

1079. *Id.* at 1080. This plan is an assurance by the CCH that its study (under the grant) would comply with federal regulations governing research on human subjects. *Id.*

1080. *Id*. For purposes of the qui tam action, CCH includes Cook County. *Id.*

1081. *Id*. at 1079-81. The defendants advanced three arguments. First, the defendants argued that qui tam relators do not have Article III standing to bring a FCA claim. The court held that because the U.S. government suffered an injury, Chandler had standing to sue under the qui tam provisions. Second, the defendants argued that the qui tam provisions violate separation of powers principles by encroaching on the executive branch's authority because they allow a private citizen to sue on behalf of the government. The court concluded that this argument lacked merit because the executive branch maintains control over the litigation under the FCA. For example, 31 U.S.C. § 3730(b)(2), and (c)(3) allow the government to intervene and prosecute a case. In addition, 31 U.S.C.§ 3730(c)(2) authorizes the government to dismiss or settle an action over the realtor's objections. The defendant's final argument claimed that the qui tam provisions violated the Constitution's Appointments Clause. The court disagreed, finding the FCA's qui tam provisions constitutional. *Chandler*, 35 F. Supp. 2d at 1079-81.

Is a State a Person? Circuit Courts Split

Two months after the decision in *Chandler*, the D.C. Circuit Court of Appeals issued a contrary opinion in *United States* ex rel. *Long v. SCS Business & Technical Institute, Inc*.[1084] The D.C. Circuit addressed the issue of whether a state is a "person" for qui tam suits.

In *Long*, the State of New York[1085] moved to dismiss the qui tam plaintiff's suit, arguing that states are not "persons" under the FCA and, even if they were, the Eleventh Amendment to the U.S. Constitution would bar the suit.[1086] In March 1999, the U.S. District Court for the District of Columbia rejected the defendant's arguments and denied its motion to dismiss.[1087] On appeal, the D.C. Circuit addressed the defendant's two arguments but declined to make a ruling as to the whether the Eleventh Amendment precludes a state from being a qui tam defendant.

As to the first issue, the D.C. Circuit noted that the FCA does not define the term "person." Instead, the D.C. Circuit adopted the Supreme Court's common usage of the term "person" which did not include a sovereign.[1088] Furthermore, the D.C. Circuit was not persuaded by the qui tam plaintiff's argument that the legislative history proved conclusively that Congress intended to include a state as a "person."[1089] The D.C. Circuit observed that the plaintiff relied on the legislative history for the 1986 amendments to the FCA, not the legislative history for the original statute. The D.C. Circuit then concluded that this legislative history could not possibly represent the Congress's intent when it enacted the FCA in 1863, and rejected the plaintiff's argument.[1090]

As to the second issue, the plaintiff contended that the Eleventh Amendment does not preclude a private citizen from suing a state under the qui tam provisions of the FCA. The plaintiff argued that he was a private attorney general suing on behalf of the government. Traditionally, courts have found this argument persuasive and viewed qui tam suits as suits by the government rather than the individual citizen;[1091] however, the D.C. Circuit found this analogy implausible and disagreed, stating:

> To accept the "private Attorneys General" characterization as anything more than an inapt convention would run headlong into the problems of how a party with a statutory right to sue on his own behalf can be thought to be acting in a representational capacity . . . why the [U.S. government] would need the court's permission to intervene in his own suit . . . or to dismiss the lawyer's suit . . . and why the lawyer's status and right would be worthy of statutory protection in the event

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1082. *Chandler*, 35 F. Supp. 2d at 1084. *See* S. REP. NO. 99-345 (1986).

1083. *Id*. at 1086. The court also looked to the Second Circuit Court of Appeals for guidance. *See* United States *ex rel*. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998) (holding that the FCA applies to state and local governments).

1084. 173 F.3d 870 (D.C. Cir. 1999).

1085. *Id*. at 872. Long claimed that the SCS Business and Technical Institute, which operates five business and technical schools in New York City made false claims to the federal government to receive federal funding for students attending SCS schools under the tuition assistance programs. Long alleged that the various state officials in the State Department of Education knew of the fraudulent claims and conspired with SCS to conceal the fraud to obtain federal funding for SCS. The state officials conspired with SCS because its funding depended on the tuition assessments and fines SCS paid to the State Department of Education. *Id*.

1086. *Id*. at 873. *See* U.S. CONST. amend. XI. The Eleventh Amendment prohibits private citizens from suing state governments. *Id*.

1087. *Long*, 173 F.3d at 873. *See* United States *ex rel*. Long v. SCS Business & Technical Institute, 999 F. Supp. 78 (D.D.C. 1998).

1088. *Long*, 173 F.3d at 874 (citing Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989)).

1089. *Id*. at 877. The "post-enactment" legislative history states:

> The False Claims Act reaches all parties who may submit false claims. The term "person" is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof.

Id. (citing S. REP. NO. 99-345, at 8-9 (1986)).

1090. *Id*. The D.C. Circuit stated:

> Post-enactment legislative history–perhaps better referred to as "legislative future"–becomes of absolutely no significance when the subsequent Congress (or more precisely, a committee of one House) takes on the role of a court and in its reports asserts the meaning of a prior statute.

Id.

1091. *Id*. at 884. *See* United States *ex rel*. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998); United States *ex rel*. Rogers v. Arkansas, 154 F.3d 865 (8th Cir. 1998).

> the client chooses to intervene in the lawyer's action . . . .[1092]

Despite concluding that the Eleventh Amendment would likely preclude a private citizen from suing a state, the court refused to rest its holding on the strength of the constitutional argument imbedded in the Eleventh Amendment. Instead, the court concluded that it had a duty to avoid serious constitutional questions and base its holding on other grounds whenever possible. Reversing the lower court's holding, the D.C. Circuit held that a state is not a "person" under the FCA, concluding that Congress had not expressed its intent clearly on this issue.[1093]

Taxation

Personal Property, How Do I Tax Thee? Let Me Count the Ways

As noted recently by the Ninth Circuit Court of Appeals, "[t]he doctrine of intergovernmental tax immunity has deteriorated into a morass of 'inconsistent decisions and excessively delicate distinctions.'"[1094] Several decisions from the past year illustrate the battles being waged between state revenue authorities, and the federal government and its contractors.

Nevada's Beneficial Use Tax Ruled Constitutional

The Ninth Circuit recently held that counties may impose real and personal property tax on a government contractor's beneficial use of government property.[1095] After the Ninth Circuit struck down an earlier attempt to tax federal property,[1096] the Nevada legislature modified the statutory language to tax a contractor's beneficial use of federal property, rather than the federal property itself.[1097]

The government and numerous contractors challenged the modified tax law's applicability to leasehold interests of the contractors who managed and operated government facilities for the DOE.[1098] After the case made its way to the Ninth Circuit, the court recited the basic premise that states may not tax the federal government or its property directly,[1099] but may tax private parties who use federal property.[1100] The court found the Nevada tax scheme was supported by the decision in *United States v. Township of Muskegon*,[1101] which allowed a tax on property a contractor used for its own commercial activities. The Ninth Circuit found that the contractors in this case did not meet the test for tax immunity, and concluded that Nevada could tax their beneficial use of government property.[1102]

Ohio's Reliance on Federal Statute is Misplaced

In *General Dynamics Land Systems, Inc. v. Tracy*,[1103] the Ohio Supreme Court ruled that Ohio could not use § 2667 of Title 10, U.S. Code,[1104] as a basis for taxing the personal property used by General Dynamics Land Systems (GDLS) to manufacture tanks at the Lima Army Tank Plant, a federal enclave.[1105]

1092. *Long*, 173 F.3d at 886. *See* 31 U.S.C.A. § 3730 (West 1999). The D.C. Circuit is referring to various provisions in § 3730 that require the government to obtain the court's consent to intervene and dismiss the qui tam suit. Additionally, the FCA specifically protects the relator's status and rights in the qui tam suit if the government later decides to intervene in the suit after initially declining to prosecute the case. *Id.*

1093. *Long*, 173 F.3d at 889. Four days before the D.C. Circuit's decision in *Long*, the Fifth Circuit Court of Appeals held for the state of Texas and concluded that the Eleventh Amendment precluded private individuals from suing the state of Texas. United States *ex rel.* Foulds v. Texas Tech Univ., 171 F.3d 279 (5th Cir. 1999) The Fifth Circuit addressed the ultimate constitutional issue that the D.C. Circuit avoided so carefully. In *Foulds*, the Fifth Circuit held that the Eleventh Amendment bars suits against a sovereign state in a federal court when the government declines to prosecute the qui tam suit. *Id.* at 293. This holding seems to allow private individuals to bring qui tam suits against a state if the government decides to prosecute the case. Have the floodgates been opened? Maybe. In light of the decisions in *Long* and *Foulds*, the state of Vermont asked the Supreme Court to decide the ultimate issue of whether states are immune from qui tam suits. *See Qui Tam Litigation: Supreme Court Asked to Decide Whether States are Immune From Qui Tam Suits*, Fed. Cont. Daily (BNA) (June 8, 1999), *available in* LEXIS News Library, BNAFCD file.

1094. United States v. Nye County, Nevada, 178 F.3d 1080 (9th Cir. 1999). The Nye court went on to state: "We venture into the bog yet again to evaluate Nevada's latest effort to squeeze some tax revenue from the activities of its largest landowner, the United States Government." *Id.* at 1083.

1095. *Id*.

1096. United States v. Nye County, Nevada, 938 F.2d 1040 (9th Cir. 1991).

1097. *See* NEV. REV. STAT. § 361.159 (personal property); *id*. § 361.157 (real property). The modifications of the statutes, and the court's decision to uphold their constitutionality, should not be surprising, as the court in its 1991 decision had advised that taxation of a user's beneficial use of federal property would be constitutional. *Nye County, Nevada*, 938 F.3d at 1043.

1098. The United States ultimately was responsible for the tax assessments because it had cost-reimbursement arrangements with its contractors. *Id.* at 1083.

1099. *Id*. (citing M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435 (1819)).

1100. *Id.* at 1083 (citing United States v. New Mexico, 455 U.S. 720, 734 (1982)).

1101. 355 U.S. 484 (1958).

In 1982, the Army granted GDLS a license to use the plant rent-free.[1106] Under the license, the Army reimbursed GDLS its costs for managing the plant.[1107] Through a separate contract GDLS manufactured tanks for the Army at the plant.[1108] The State of Ohio assessed property taxes against the personal property owned and used by GDLS to manufacture tanks at the plant.[1109] GDLS appealed the tax assessments to the state's Board of Tax Appeals (BTA).[1110] After the BTA upheld the assessments, GDLS appealed to the Ohio Supreme Court.

The court reversed the decisions of the tax commissioner and the BTA, holding that § 2667 did not give Ohio the right to tax the personal property of the lessee, since the property was not leased from the federal government.[1111] The court rejected the contention that the legislative history of § 2667 evinced the intent to tax private property brought onto land leased by the federal government.[1112] In addition, the court distinguished this case from a United States Supreme Court decision involving the predecessor Act to § 2667, which allowed Nebraska to tax appliances associated with a leasehold interest.[1113]

Overhead Purchases are not Subject to Arizona Use Tax

In *Motorola v. Arizona Department of Revenue*,[1114] the Arizona Court of Appeals held that the state use tax [1115] did not

1102. *Nye County, Nevada*, 178 F.3d at 1086. The court also supported its holding by citing the Supreme Court's tax immunity test enunciated in *United States v. New Mexico*:

> [T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.

Id. at 1086 (quoting United States v. Mexico, 455 U.S. 720 (1982)).

1103. 700 N.E.2d 1242 (Ohio 1998).

1104. 10 U.S.C.A. § 2667(e) (West 1999). This subsection of Title 10 states:

> State or local governments may tax the interest of a lessee of property under this section. A lease under this section shall provide that, if and to the extent leased property is later made taxable by State or local governments under an Act of Congress, the lease shall be renegotiated.

Id.

1105. As an initial holding in the case, the court ruled that the plant was located on an area under exclusive federal legislative jurisdiction. The Appellee, the Tax Commissioner of Ohio, argued that the U.S. had never accepted exclusive legislative jurisdiction over the land, despite separate letters sent in 1943 and 1945 by the Secretary of War to Ohio's Governor purporting to accept jurisdiction over the property. The Ohio Supreme Court disagreed, citing as persuasive Attorney General opinions interpreting the letters as validly accepting exclusive jurisdiction on behalf of the United States. *General Dynamics*, 700 N.E.2d at 1244-45. For a detailed discussion of legislative jurisdiction on military installations, see DEP'T OF THE ARMY, THE JUDGE ADVOCATE GENERAL'S SCHOOL, ADMINISTRATIVE & CIVIL LAW DEPARTMENT, THE LAW OF MILITARY INSTALLATIONS DESKBOOK, JA 221, ch. 2, Sept. 1996, *available at* <http://www.jagcnet.army.mil> (access limited to registered Department of Defense users).

1106. The court found the rent-free license constituted a lease for purposes of applying 10 U.S.C. § 2667. *General Dynamics*, 700 N.E.2d at 1245 (citing United States v. Muskegon Twp., 355 U.S. 484 (1958)).

1107. *Id.* at 1242.

1108. *Id.*

1109. *Id.*

1110. *Id.*

1111. *Id.* at 1245.

1112. *General Dynamics*, 700 N.E.2d at 1246. In *Secretary of Treasury of Puerto Rico v. Esso Standard Oil Co.*, 332 F.2d 624 (1st Cir. 1964), the First Circuit Court of Appeals interpreted the legislative history of § 2667 to allow the taxation not only of property leased under the section but also of personal property brought onto land leased under the section. The Ohio Supreme Court referenced three separate decisions it believed contradicted the conclusion of the *Esso* court. *General Dynamics*, 700 N.E.2d at 1246.

1113. *General Dynamics*, 700 N.E.2d at 1246. *See* Offutt Housing Co. v. Sarpy Cty., 351 U.S. 253 (1956). The court stated that *Offutt* was not on point since the appliances were to be left on the property at the end of the lease. In contrast, GDLS was not required to leave behind its personal property at the expiration of its lease. *General Dynamics*, 700 N.E.2d at 1246.

1114. 1 CA-TX 98-0009, 1999 Ariz. App. LEXIS 127 (Ariz. Ct. App. July 13, 1999).

1115. The use tax applies to tangible personal property purchased from a retailer that is stored, used, or consumed. The tax does not extend to items for sale. *Id.* at *2-*3 (citing ARIZ. REV. STAT. § 42-5155(A)).

encompass a contractor's use of certain items characterized as "indirect costs" of its federal contracts. The Arizona Department of Revenue (DOR) had assessed $483,587 in delinquent use taxes against Motorola, a federal government contractor. The assessment involved Motorola's purchases of overhead items allocated to federal contracts from 1985 to 1989.[1116]

Motorola appealed the tax assessment, and the tax court abated the assessment and ordered DOR to refund $473,713 in additional use taxes the contractor had paid on similar purchases from 1986 to 1991. The tax court held that the federal government had obtained title to the overhead property, so the use tax did not apply to Motorola.[1117] On appeal, the court of appeals affirmed the judgment of the tax court, concluding that the independent research and development and overhead items were not taxable under Arizona's use tax.[1118] The court concluded that because title for the overhead items passed to the government, the items were sold and were not subject to the tax.[1119]

That FAR Clause Means What It Says–Contractor Is Liable For Taxes

Two Boards of Contract Appeals denied the appeals of contractors seeking relief from state taxes, citing to the contracts' "Federal, State, and Local Taxes" clauses.[1120] In *Heritage Healthcare Services, Inc.*,[1121] the board refused to reform two contracts to compensate the contractor for costs of the state gross receipts taxes. The contractor alleged that it had a pre-bid conversation with the contracting officer, at which time the contracting officer told the contractor its contract would not be subject to the gross receipts tax.[1122] The contractor, however, failed to meet its burden of proving that there was a mutual mistake concerning the tax liability, such that reformation would be allowed.[1123] Accordingly, the board denied the appeal.[1124]

In *Cannon Structures, Inc.*,[1125] the board denied the appeal of a construction contractor seeking an equitable adjustment for a state transaction privilege tax (STPT) it alleged was unexpectedly levied against it near the conclusion of contract performance.[1126] Because Cannon's contract was awarded competitively, the contract's tax clause provided for an increase in contract price only if an after-imposed federal tax–not a state or local tax–was imposed on the contractor.[1127] Though the board believed that the contractor was entitled to protection in a case such as this, the plain language of the clause required the board to deny the appeal.[1128]

$2.5 Million Business Deduction Denied for False Claims Settlement Payment

In *Talley Industries, Inc. v. Commissioner of Internal Revenue*[1129] the United States Tax Court disallowed Talley's federal income tax deduction of a $2.5 million payment made to the Navy in settlement of civil and criminal false claims liability. The viability of the deduction hinged on whether the payment

1116. Motorola employed items of tangible personal property in ways that could not be specifically attributed to its performance of any particular contract, federal government or private. The items comprised the contractor's overhead and independent research and development purchases. It is taxation of these indirect cost items that were disputed in the case. *Id*. at *5-*6.

1117. *Id*. at *5. The tax court granted summary judgment to Motorola, stating: "Because title to the overhead property was transferred to the government under both the cost-type and fixed price contracts at issue, this court concludes that plaintiff is exempt from taxation under the use tax statute based on the resale exception." *Id.*

1118. *Id*. at *27.

1119. *Id.* at *12.

1120. FAR, *supra* note 17, at 52.229-3.

1121. VABCA Nos. 5603, 5604, 99-1 BCA ¶ 30,209.

1122. *Id.* at 149,464. The contracting officer did not recall having such a conversation with the contractor. *Id.*

1123. *Id.* at 149,467. The board mentioned a factual scenario under which reformation based on mutual mistake might have applied. If the government had told the contractor during negotiations that the tax was inapplicable, and knew that the contractor had removed the costs of the tax from its proposal, the contractor might have been able to recover. *Id.*

1124. *Id.* at 149,468.

1125. IBCA No. 3968-98, 99-1 BCA ¶ 30,236.

1126. The contractor admitted that the tax was included in Arizona's tax statute, but it alleged that the state had not been collecting the tax in connection with Indian reservation construction projects at the time it received the government contract. The contractor further alleged that it had no reason to believe the project would be subject to the tax. *Id.* at 149,578. Approximately one month after the Interior Board of Contract Appeals denied Cannon's appeal, the Supreme Court held that a federal contractor was not immune from Arizona's STPT simply because it rendered its services on an Indian reservation. *See* Arizona Dept. of Revenue v. Blaze Constr. Co., Inc., 526 U.S. 32 (1999).

1127. *Cannon*, 99-1 BCA ¶ 30,236 at 149,579 (citing FAR, *supra* note 17, at 52.229-3(c)). In contrast, a noncompetitive contract award provides relief from after-imposed federal, state, and local taxes. *Id*. at 149,579 (citing FAR, *supra* note 17, at 52.229-4(c)).

was made as a penalty, or as compensation to the Navy for its losses. Talley had the burden of proving that the settlement payment was intended to compensate the government for its losses, in which case Talley would be entitled to the deduction. Because the settlement agreement was silent on the characterization of the payment, and the extrinsic evidence showed no agreement on the characterization,[1130] the court found that Talley failed to establish entitlement to the deduction.[1131]

Technical Data Rights

Agency Relinquishment of Technical Data Rights Was Permissible

In the past year, the COFC determined that an agency may relinquish technical data rights as part of a contract dispute settlement–even though it then precluded competitive procurements involving the data–as long as the loss of the data rights represented a reasonable litigation risk.[1132]

FN Manufacturing, Inc. (FNMI) protested[1133] the Army's award of a sole-source contract to Colt's Manufacturing Company for production of the M4/M4A1 carbines.[1134] In 1967, the Army entered into a licensing agreement with Colt's that afforded the Army limited technical data rights to the M16 rifle.[1135] Colt's later developed the M4/M4A1 carbines, weapons derived from, and sharing a majority of their parts with, the M16 rifle. Although the parties disputed the share of the government's financial contribution to the M4 development, it was clear that Colt's had committed its own funds to the project. In 1985, Colt's informed the Army that it considered the 1967 Licensing Agreement to cover the M4 carbines.

In 1996, the Army released the M4 technical data package (TDP) to the Navy, who disclosed it improperly in a solicitation for M4 adapters.[1136] Colt's notified the Army that it had violated the licensing agreement by failing to protect Colt's proprietary data adequately.[1137] Colt's also asserted that the Army's material breach terminated the licensing agreement and that the Army could no longer use the TDP in the procurement of the M4 *or the M16*.[1138]

Colt's and the Army then held settlement discussions regarding the M16 licensing issue. Despite its long-held position, Colt's now contended that the licensing agreement did not cover the M4. Colt's offered evidence to support its claim that it had developed, tested, and refined M4 parts solely at company expense. The Army's official position was that the M4 disclosure was not a breach of the licensing agreement.[1139] Nonetheless, the parties agreed on a complete settlement. Regarding the M4 data rights, the settlement gave the Army "a non-exclusive, non-transferable limited rights license in the M4 data that precluded the Government from using the M4's tech-

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1128. *Id.* at 149,580. The board concluded that the FAR council should review the clause:

> It is not clear why the Government should routinely reap the benefit of the fact that these taxes are often imposed upon its contractors unexpectedly and without notice, and therefore cannot be included in formal bids (except as undesirable contingency item), or why the contractor should be held to have accepted the risk of such an unexpected tax imposition despite the fact that the project on which the tax was imposed was entirely for the benefit of the Government and was a legitimate project cost.

Id.

1129. No. 27826-92, 1999 Tax Ct. Memo LEXIS 237 (T.C. June 18, 1999).

1130. The court reviewed the parties' prior negotiations and communications concerning the settlement. *Id.* at *22-*23.

1131. *Id.* at *23.

1132. FN Mfg., Inc. v. United States, 42 Fed. Cl. 87 (1998).

1133. This in fact represented the third time this case had come before the court, the parties having already litigated two procedural issues. *Id.* at 88-89. Accordingly, in the interest of seeking an expeditious resolution of this controversy, the parties jointly asked the court to rule upon the data rights relinquishment issue. *Id.* at 89.

1134. The M4/M4A1 carbines are lightweight, air-cooled, gas-operated personal weapons. WEAPONS SYSTEMS 1999, *supra* note 988, at 192-93. The word carbine refers to a short rifle. THE RANDOM HOUSE COLLEGE DICTIONARY 202 (rev. ed. 1980). The M4/M4A1 carbines are the successor weapon to the M16 rifle used currently by American and NATO ground forces. *FN Mfg.*, 42 Fed. Cl. at 88.

1135. *Id.* at 89. Under the licensing agreement, the Army could release the technical data package (TDP) for use in competitive procurements involving the acquisition of the M16 and its component parts, provided the manufacture take place in the United States. *Id.*

1136. *Id.* at 89-90. M4 adapters permit modification of the weapon to allow firing of blank rounds during training exercises. *Id.* at 90.

1137. *Id.* Colt's estimated the damages arising from the improper release of the technical data at between $43.5 and $70 million. *Id.*

1138. *Id.* (emphasis added).

1139. *Id.* Despite the public pronouncements, the Army possessed a "great concern" that a resort to litigation might jeopardize its right to use Colt's proprietary technical data in the manufacture of the M16. *Id.*

nical data package in competitive procurements until the year 2011."[1140] Subsequently, the Army awarded a sole-source contract for M4 carbines to Colt's, citing as its justification the Army's lack of technical data rights in certain M4 components.

In its decision, COFC first determined that the Army did not relinquish impermissibly its rights in technical data to which it was otherwise entitled. The United States is "accorded" unlimited rights in technical data where government money represents the exclusive funding source in the development of the item in question.[1141] By contrast, the United States has no minimum rights in technical data where government and private money funded the development of the item jointly. In such circumstances, "the respective rights of the United States and of the contractor . . . in technical data . . . shall be based upon [mutual] negotiations."[1142] Thus, in the present mixed-funding situation, the level of M4 data rights that the Army obtained from Colt's was entirely proper.[1143]

The COFC confronted FNMI's argument that by relinquishing the M4 data rights, the Army violated CICA's mandate for full and open competition. Here, the court determined that not every data rights release violates CICA: "[I]f the Government relinquishes data rights as a bargaining tool to satisfy or extinguish an unrelated claim, it comes into conflict with [CICA] and its actions must be voided. If instead, however, the Government relinquishes data rights that are themselves in dispute, its actions cannot be said impermissibly to contravene CICA."[1144]

FISCAL LAW

Purpose

New Guidance on Use of Agency Equipment by Employees

In January 1999, the GAO issued an opinion concerning the use of official time and agency resources for National Guard and Reserve functions by federal employees who are members of the National Guard or armed forces Reserves.[1145] The GAO stated that agencies had the discretion to permit their employees to use agency resources to carry out limited, incidental Guard and Reserve business. In its opinion, the GAO suggested that the Office of Personnel Management (OPM) develop guidance for agencies to use in determining under what circumstances an employee may use official time and agency equipment to perform limited Guard and Reserve functions.

On 3 June 1999, the OPM issued its guidance.[1146] The guidelines permit using official time and resources if the use involves minimal expense to the government and does not interfere with official business. The OPM recommended that the agency should limit the use to situations where the employee cannot schedule the National Guard or Reserve business for non-working hours or when the employee cannot make reasonable arrangements to perform the functions elsewhere. Furthermore, the guidance states that an agency may require employees to obtain appropriate supervisory approval before performing the activity during work hours.

1140. *Id.* at 91. Concerning the M16 data rights, the parties agreed to leave in place the 1967 Licensing Agreement, with Colt's not pursuing its damages claim. *Id.*

1141. *Id.* at 92 (citing 10 U.S.C.A. § 2320(a)(2)(A) (West 1999)).

1142. *Id.* (citing 10 U.S.C.A. § 2320(a)(2)(E)).

1143. *Id.* at 93. The court stated: "Since 10 U.S.C. § 2320 imposes no minimum requirement on rights the Government must negotiate in the mixed funding context, we see no reason to preclude it from relinquishing rights it had no obligation to obtain in the first instance." *Id.*

1144. *Id.* The court recognized that the government's interest in achieving competition did not preclude a reasonable litigation risk assessment: "[w]e do not read CICA as preventing the Government from achieving, through settlement, a result with regard to data rights that a court, faced with the identical dispute, could itself reach as an adjudicated outcome." *Id.* In a subsequent decision, the court determined that the government's relinquishment of disputed M4 data rights was the byproduct of an informed and well thought-out assessment of its litigation risks. FN Mfg., Inc. v. United States, 44 Fed. Cl. 453 (1999).

1145. B-277678, 1999 U.S. Comp. Gen. LEXIS 104 (Jan. 4, 1999). The case involved a federal employee who was also a member of the Reserves. The employee's reserve unit wanted to conduct a notification recall that would have required the employee to use the agency's telephone and facsimile machine during official work hours. The employee requested permission to perform the reserve business, which agency officials denied. Subsequently, the OPM requested an advisory opinion from the GAO concerning the propriety of using of official time and equipment. *Id.* at *1. In its decision, the GAO recognized that the National Guard and Reserve form an important part of our national defense and assist communities during disasters and emergencies. Furthermore, the GAO stated that Congress has encouraged and supported employees' participation in the National Guard and Reserves by various legislative measures, including job security. Although not all federal agencies have the same nexus with the National Guard and Reserves as does the DOD, the GAO opined that all agencies have some interest in furthering the governmental purpose of, and national interest in, the National Guard and Reserves. Therefore, the GAO determined that an agency may allow the limited use of official time and resources for such a purpose. *Id.* at *11.

1146. Memorandum from Lorraine Lewis, General Counsel, Office of Personnel Management to General Counsels and Heads of Personnel Office, subject: Use of Official Time and Agency Resources by Federal Employees who are Members of the National Guard or Armed Forces Reserves (3 June 1999) (on file with the Contract and Fiscal Law Department, The Judge Advocate General's School, Charlottesville, Virginia).

The INS Gets a Medal!

The Purpose Statute provides that "[a]n appropriation is available only for the objects for which the appropriation was made."[1147] When an appropriation does not authorize a purchase specifically, an agency must look to see if the purchase is permissible by determining if it is reasonably necessary to carry out an authorized function or will contribute materially to the effective accomplishment of that function.[1148] In a recent decision, the GAO ruled that an agency may purchase medals for its employees' uniforms using a general appropriation.

In *Immigration and Naturalization Service*,[1149] the Immigration and Naturalization Service (INS) requested a GAO advisory opinion as to whether the INS could use its Salaries and Expenses Appropriation to purchase medals for its employees. The GAO found that the INS could purchase the medals from this general appropriation. In concluding that the INS could use its general appropriation, the GAO found that the medals were of no independent intrinsic value to the employees and furthered directly the INS' mission.[1150] The GAO stated that the "medals are not gifts, but are part of a[n agency's employee's] uniform that the [employee] will wear at specified times."[1151] Additionally, the GAO found that the medals conveyed, as well as served, an institutional purpose by: (1) reminding the public and the agency staff of the agency's dedication and hard work; (2) advancing knowledge and appreciation for the agency's history and mission; and (3) promoting the agency's stability and longevity.[1152]

Don't Phone Me; I'll E-mail You!

Title 31, United States Code, § 1348(a)(1), provides that an agency may not use appropriated funds to install telephones in, or to pay for telephone service charges from, private residences.[1153] In *Federal Communications Commission–Installation of Integrated Services Digital Network Lines*,[1154] the GAO ruled that a telephone line used exclusively for data transmission is not "telephone service" within the meaning of 31 U.S.C. § 1348(a)(1).

The Federal Communications Commission (FCC) asked the GAO for an advance decision on the FCC's proposed installation of Integrated Services Digital Network (ISDN) lines in its commissioners' private residences.[1155] In its request, the agency stated that extensive travel schedules, heavy workloads, and pressing deadlines required the FCC Commissioners to conduct official business outside normal duty hours. The FCC determined that ISDN lines in the commissioners' residences would allow the commissioners to conduct business at all hours of the day and night.[1156] The FCC explained that the ISDN lines would permit data transmission only and that the FCC would configure the lines to prohibit voice telephone service.[1157]

1147. 31 U.S.C.A. § 1301(a) (West 1999).

1148. *See* Internal Revenue Serv. Fed. Credit Union, 66 Comp. Gen. 356, 359 (1987). This rule is commonly referred to as the "necessary expense" rule. *Id.* When the GAO reviews a case's facts in light of the necessary expense rule, the GAO inquires as to whether the relationship of the proposed purchase to the particular appropriation is so attenuated that it removes the purchase from the agency's legitimate range of discretion. *See* Expenditures by the Department of Veterans Affairs Medical Ctr., B-247563, B-247563.2, May 12, 1993 (unpub.).

1149. B-280440, Feb. 26, 1999, *available at* The General Accounting Office (visited Oct. 25, 1999) <http://www.gao.gov>. The INS sought to purchase medals for its Border Patrol division employees to commemorate the division's 75th anniversary. The medals' cost would be between eight dollars and nine dollars each. The total cost to INS would be approximately $99,000. The INS stated that its uniformed agents would wear the medals to "heighten public awareness of the stability and longevity of the division, hopefully creating goodwill that would benefit the agents while they perform their duties." *Id*. The INS concluded that its general appropriation was not available for such a purchase but requested the GAO's decision. *Id*.

1150. *Id*. at 2. The GAO discussed that items such as commemorative medals are viewed often as personal gifts or souvenirs, for which appropriations are unavailable generally. The GAO, however, did state that in certain situations, such items may advance legitimate agency goals and policies. This is true especially when the item has no independent intrinsic value to the recipient. *Id*.

1151. *Id*.

1152. *Id*.

1153. 31 U.S.C.A. § 1348 (a)(1) (West 1999).

1154. B-280698, Jan. 12, 1999, *available at* The General Accounting Office (visited Feb. 2, 1999) <http://gao.gov>.

1155. *Id*. Integrated Services Digital Network is a "network which is designed and constructed to provide a wide range of telecommunication and information services and to transport electrical signals in digital rather than analog form." *Id.* at 3 n.1.

1156. *Id.* at 1. The commissioners wanted to conduct business such as editing legal memoranda, drafting decisions, preparing speeches, and receiving electronic mail from the FCC's offices. *Id.*

1157. *Id.* at 2. In addition to the FCC's safeguard measures, the ISDN lines have data encryption that provides security for transmitted information. The FCC asserted that such data encryption was important because of the sensitive nature of correspondence and legal and policy memoranda to which the commissioners would have access. The FCC argued that it must protect against premature disclosure of FCC's legal strategies and decisions and any proprietary information that correspondences may include. *Id*.

The GAO noted that Congress enacted the telephone service prohibition to ensure the cost of personal telephone use would not be charged to the government.[1158] The GAO discussed also that when the telephone service restricts use or involves adequate safeguards and the installed telephone service is essential, the statutory prohibition does not apply.[1159] Because of the FCC's articulated need for ISDN lines and the security measures included to prohibit private voice transmissions, the GAO ruled that 31 U.S.C. § 1348(a)(1) does not preclude the FCC from using its appropriated funds to install ISDN lines in the commissioners' private residences.[1160]

Time

One of the vital tools for contract funding is 10 U.S.C.A. § 2410a,[1161] which permits DOD agencies to enter into severable service contracts crossing fiscal years. On 25 May 1999, the Director of Defense Procurement issued a final rule amending the DFARS to give the DOD contracting officers authority to enter into such contracts.[1162] This rule supplements the FAR rule, which vests this authority in the heads of executive branch agencies.[1163]

Construction Funding

The DCAA Issues Guidance on Federally Funded Research and Development Centers (FFRDCs)

Section 8034(c) of the DOD Appropriations Act for Fiscal Year 1999 prohibited the use of DOD funds to construct new buildings at FFRDCs.[1164] On 17 June 1999, the DCAA responded to this prohibition by issuing new audit guidance to its regional directors and field detachments.[1165]

According to the DCAA, the restrictive language in last year's DOD Appropriations Act, like the restrictive language in several previous DOD Appropriations Acts,[1166] prohibits three things. First, the language prohibits FFRDCs from using their reserve funds or management fees to construct new buildings if those funds or fees came from DOD appropriations. Second, it

1158. *Id*. (discussing a 1912 Comptroller of the Treasury opinion, 63 MS Comp. Dec. 575 (1912)). Likewise, the GAO stated that Congress did not enact the prohibition to require government officials to bear the telephone service expense of public business. *Id.*

1159. *Id*. Another instance in which the statutory prohibition does not apply is the telephone installation in government-owned quarters serving as both residence and as an office. *Id.*

1160. *Id*. at 3. The GAO also discussed the congressional authority afforded agencies to install telephone lines in employees' residences who are permitted to work at home. *Id.* (citing the Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-52, § 620, 109 Stat. 468, 501 (1995)). That authority requires agencies to certify that adequate safeguards exist to prevent private misuse and that the service is necessary for the agency to perform its mission. *Id.* Although the GAO recognized that the FCC Commissioners are presidential appointees and that this particular authority does not by its terms include such appointees, the GAO determined that it would be "anomalous for [the GAO] to overlook the public policy established in section 620 and apply the section 1348(a)(1) prohibition in a manner to preclude government officials who are on duty 24 hours from the same conveniences as other government employees." *Id.*

1161. The statute states, in part:

> The Secretary of Defense, the Secretary of a military department, or the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract does not exceed one year.

10 U.S.C.A. § 2410a(a) (West 1999).

1162. DFARS, *supra* note 190, at 232.203-3.

1163. *Id*. at 32.703-3.

1164. Section 8034(c) states:

> Notwithstanding any other provision of law, none of the funds available to the department from any source during fiscal year 1999 may be used by a defense FFRDC, through a fee or other payment mechanism, for construction of new buildings.

Pub. L. No. 105-262, § 8034(c), 112 Stat. 2279, 2304 (1998). This exact language was updated and used in Section 8034(c) of the DOD Appropriations Act for FY 2000.

1165. Memorandum, Assistant Director of Policy and Plans, Defense Contract Audit Agency, to Regional Directors, DCAA, and Director, Field Detachment, DCAA, subject: Audit Guidance on Legislative Restrictions on Federally Funded Research and Development Centers' (FFRDCs) Use of DOD Funds to Construct New Buildings (17 June 1999) [hereinafter DCAA Memo].

1166. *Id*. Similar language has appeared in every DOD Appropriations Act since FY 1995. *See* Department of Defense Appropriations Act, 1998, Pub. L. No. 105-56, § 8035(c), 111 Stat. 1203, 1227 (1997); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 8037(c), 110 Stat. 3009, 3009-96 (1996); Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8046(c), 109 Stat. 636, 660-61 (1995); Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8054(f), 108 Stat. 2599, 2630 (1994). Therefore, DCAA's guidance applies to the use of any DOD appropriations from FY 1995 to present. DCAA Memo, *supra* note 1165.

prohibits FFRDCs from using DOD appropriations to recoup depreciation for new buildings.[1167] Finally, the law prohibits FFRDCs from using DOD appropriations to repay any money they borrowed to construct new buildings. The DCAA advised its auditors to question such costs and require FFRDCs to show that they did not use DOD funds for new construction projects.

In addition, the DCAA advised its auditors to question: (1) leases involving buildings constructed specifically for FFRDCs, and (2) capital leases.[1168] The DCAA opined that these leases may violate Congress's intent because they are not always arms-length transactions and FFRDCs can use these leases as surrogates for building ownership. Therefore, the DCAA advised its auditors to review such leases on a case-by-case basis and report them to the contracting officer if necessary.[1169]

Nonappropriated Funds

When appropriated funds are not used to fund a contract requirement, the set-aside requirements of FAR Part 19 do not apply, concluded the GAO in *EAA Capital Company.*[1170] In that case, the HUD issued an unrestricted RFQ, seeking a National Testing Administrator to provide examinations to Federal Housing Administration real estate appraisers in all fifty states and U.S. territories. The RFQ explained that the Administrator would be paid through fees charged the test takers, thus, no appropriated funds would be expended. EAA protested before the due date for receipt of quotations. After receiving and evaluating quotes from Sylvan (a large business), and EAA, the HUD issued a purchase order to Sylvan.

The original RFQ erroneously stated the anticipated value of the requirement to be under $100,000.[1171] Based on the stated value, EAA contended that the HUD should have set aside award for small businesses under the provisions of FAR 19.502-2(a).[1172] As the only responsible small business to have submitted a quote, EAA argued it was entitled to award. In denying the protest, the GAO stated that the FAR set-aside requirements did not apply because the requirement was not funded with appropriated funds. The GAO has held previously that the small business set-aside requirements do not apply to requirements for no cost licensing agreements[1173] and concession services.[1174]

Intragovernmental Acquisitions

The DOD Issues New Task and Delivery Order Regulation

As we reported last year,[1175] § 814 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999[1176] required the DOD to revise its regulations pertaining to interagency acquisitions under the Economy Act[1177] to cover orders issued under task or delivery order contracts.[1178] Consequently, on 25 March 1999, the DOD amended DFARS Subpart 217.5, Interagency Acquisitions Under the Economy Act, to explicitly

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1167. DCAA Memo, *supra* note 1165. The DCAA explained the concept of depreciation as follows:

> FAR 31.205-11(a) defines depreciation as a charge to current operations, which distributes the cost of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset in a systematic and logical manner. In a practical sense, the reimbursement of depreciation is the reimbursement of the cost of acquisition or construction. Therefore, when a contractor requests reimbursement of the depreciation of a building that it has constructed, it is seeking reimbursement of the cost of construction and the auditor should question the costs and report it to the contracting officer.

Id.

1168. DCAA Memo, *supra* note 1165. Capital leases are installment purchases of property. DFARS, *supra* note 190, at 207.471(c).

1169. DCAA Memo, *supra* note 1165.

1170. B-282377.2, 1999 U.S. Comp. Gen. LEXIS 99 (June 23, 1999).

1171. The financial value of the contract was $1.7 million, according to the awardee's quote. Additionally, a HUD response to a vendor question explained that the $100,000 ceiling did not apply because all costs were to be paid by the test taker. The response was incorporated into the RFQ.

1172. FAR, *supra* note 17, at 19.502-2(a). The FAR provides, with certain exceptions, that acquisitions between $2500 and $100,000 are automatically reserved for small business concerns.

1173. Simplix, B-274388, Dec. 6, 1996, 96-2 CPD ¶ 216.

1174. Good Food Serv., Inc., B-253161, Aug. 19, 1993, 93-2 CPD ¶ 107; *recon. denied*, B-256526.3, July 11, 1994, 94-2 CPD ¶ 16.

1175. *1998 Year in Review, supra* note 3, at 125.

1176. Pub. L. No. 105-261, § 814, 112 Stat. 1920, 2087-88 (1998).

1177. 31 U.S.C.A. § 1535 (West 1999). The Economy Act permits federal agencies to acquire goods and services from other federal agencies with the intent to promote economy in government operations.

include orders under task or delivery order contracts entered into by other agencies.[1179] This change is significant because it makes clear that task and delivery orders placed pursuant to the Economy Act are subject to the DOD interagency purchase procedures and the FAR requirements.

Judgment Fund[1180]

Air Force Proposes Legislation to Access Judgment Fund for ADR

On 26 April 1999, the Air Force announced a series of initiatives, known as "ADR First," to encourage the use of ADR techniques to resolve contract disputes.[1181] One of these initiatives involves a broad legislative proposal that will allow a DOD agency to access the Judgment Fund to pay an ADR settlement if it meets seven conditions.[1182] First, the agency must use a dispute resolution proceeding authorized by the Administrative Dispute Resolution Act of 1996.[1183] Second, the agency must use a board of contract appeals (BCA) judge as the neutral.[1184] Third, the BCA judge must conclude that the proposed settlement is within the "zone of reasonableness."[1185] Fourth, the ADR settlement for a single contract dispute must be less than $250 million. Fifth, the agency must reimburse the Judgment Fund by the end of the third fiscal year after it pays the settlement.[1186] Sixth, the agency must track its use of this authority so that it can evaluate and report the results of the pilot program to Congress when the program ends. Finally, the agency may use this authority only during the life of the pilot program, which is currently slated to last five years.

[Practice Note: The DOD agencies should not take advantage of the proposed legislation if they have expired funds available to pay the proposed settlement.[1187]]

Judgment Fund Available to Pay Judgment Against Department of Health and Human Services (HHS)

In 1996, Congress recommended allocating $7.5 million of the $1.7 billion appropriated for the Indian Health Service (IHS) for FY 1996 to a "no year" Indian Self-Determination Fund (ISD Fund).[1188] One of the purposes of the ISD Fund was to pay contract support costs (CSCs) for new self-determination contracts;[1189] however, the FY 1996 and FY 1997 CSC claims exceeded the appropriations allocated to the fund. As a result, the IHS began to pay CSC claims on a first come, first serve basis.

1178. The underlying impetus for this provision was Congress's concern that the DOD agencies were using multiple award task and delivery order contracts from other agencies to avoid competition requirements. *See* Sen. Rep. No. 105-189, at 318 (1998). *See also* Valenzuela Engineering, Inc., B-277979, Jan 26, 1998, 98-1 CPD ¶ 51 (offering an example of a DOD intra-agency misuse of an Economy Act order in connection with a task and delivery order contract). The CICA prohibits an agency from obtaining goods or services from another agency unless the other agency complies fully with the CICA when it procures the goods or services required to fulfill the first agency's order. 10 U.S.C.A. § 2304(f)(5)(B) (West 1999).

1179. DFARS, *supra* note 190, at 217.500. The revised regulation provides, in part, as follows:

> Unless more specific statutory authority exists, the procedures in FAR Subpart 17.5, this subpart, and DoDI 4000.19 [U.S. DEP'T OF DEFENSE, INSTR. 4000.19, INTERSERVICE AND INTRAGOVERNMENTAL SUPPORT (9 Aug. 1995)] apply to all purchases, except micro-purchases, made for DoD by another agency. This includes orders under a task or delivery order contract entered into by the other agency. (Pub. L. 105-261, Section 814).

Id.

1180. *See* 31 U.S.C.A. § 1304 (West 1999); *see also* 41 U.S.C.A. § 612 (West 1999).

1181. *ADR: Air Force Launches New ADR Initiative*, *supra* note 809. *See supra* note 811 and accompanying text.

1182. *Id*. The DOD Office of General Counsel circulated the Air Force's draft proposal to the DOD ADR community for comment on 1 July 1999. Memorandum, ADR Liaison, Department of Defense Office of General Counsel, subject: Draft Proposal for Legislation Permitting Use of Judgement Fund for Settlements in Alternative Dispute Resolution (ADR) Proceedings (1 July 1999) [hereinafter ADR Memo].

1183. *Id*. *See* Pub. L. No. 104-320, 110 Stat. 3870 (codified at 42 U.S.C. §§ 571-583).

1184. ADR Memo, *supra* note 1182.

1185. *Id*. The proposed legislation does not define the term "zone of reasonableness." *Id.*

1186. *Id*. Federal agencies currently are required to reimburse the Judgment Fund out of funds available when the court or board renders the judgment; however, the statute does not specify a period within which an agency must do so. 41 U.S.C.A. § 612(c) (West 1999). Interestingly, the proposed legislation does not require the DOD agency to use funds that are available when the parties sign the settlement agreement to reimburse the Judgment Fund. ADR Memo, *supra* note 1182. Therefore, the agency may arguably be able to use funds appropriated in the three fiscal years following the date the agency pays the settlement to reimburse the Judgment Fund. *Id. But see* 31 U.S.C.A. § 1341 (West 1999) (prohibiting federal agencies from obligating funds in advance of an appropriation).

1187. ADR Memo, *supra* note 1182. The proposed legislation is meant to prevent the DOD agencies from having to litigate contract disputes simply because they do not have sufficient expired funds to pay a proposed settlement. However, the proposed legislation is not meant to replace existing payment authorities; it is only meant to supplement them. The Air Force consequently included the reimbursement requirement as "a strong incentive to use [the proposed] authority wisely." *Id.*

The Shosone-Bannock Tribes of the Fort Hall Reservation sued the government and won.[1190] The court concluded that the Indian Self-Determination and Education Assistance Act (ISDEA) required the HHS to use its lump sum appropriations to pay the CSC claims. Therefore, the HHS used its unrestricted FY 1996 and FY 1997 appropriations to pay the FY 1996 and FY 1997 CSC claims into the Registry of the Court.

Unfortunately, this was not the end of the case. In October 1998, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act (OCEA) for FY 1999. Among other things, this statute sought to: (1) limit the appropriations available for FY 1994 through FY 1998 CSC claims,[1191] and (2) curtail new CSC claims by placing a moratorium on new or expanded self-determination contracts.[1192] In response, the government asked the court to reconsider its order regarding the FY 1996 and FY 1997 CSC claims.

In addition to arguing that the OCEA barred the FY 1996 and FY 1997 CSC claims,[1193] the government argued that the Judgment Fund was unavailable to pay money damages for three reasons. First, the government argued that the OCEA prohibits it specifically from using the Judgment Fund to pay previous judgments. Second, the government argued that it could not use the Judgment Fund because Congress "otherwise provided for" the payment of CSC when it appropriated money for the IDS Fund.[1194] Third, the government argued that using the Judgment Fund violates the Appropriations Clause of the U.S. Constitution.[1195]

The court rejected each argument proffered by the government. In response to the government's first argument, the court noted that the OCEA does not address or affect an agency's access to the Judgment Fund.[1196] The court noted further that the "otherwise provided for" language in the statute precludes an agency's access to the Judgment Fund only if Congress appropriates money specifically to pay the judgment.[1197] Finally, the court observed that the Shoshone-Bannock Tribes sought the payment of money damages based on a court order that established their substantive right to compensation under

1188. Shoshone-Bannock Tribes v. Shalala, No. CV-96-459-ST, 1999 WL 562715 (D. Or. July 22, 1999). Omnibus Consolidated Rescissions and Appropriations Act of 1996, 104 Pub. L. No. 104-134, 110 Stat. 1321. *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379 (1993) (recommending the allocation of $7,500,000 to the ISD Fund); Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-322, 108 Stat. 2499 (1994) (recommending the allocation of $7,500,000 to the ISD Fund); *cf.* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 309 (1996) (limiting the amount available for contract support costs associated with ongoing contracts, grants, or compacts to $90,829,000, but recommending the allocation of an additional $5,000,000 to the ISD Fund).

1189. *Shoshone-Bannock*, 1999 WL 562715 at *1. Self-determination contracts are contracts, grants, or cooperative agreements between tribal organizations and the government "for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to federal law." 25 U.S.C.A. § 450b(j) (West 1999). The CSCs consist of "an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management . . . ." 25 U.S.C.A. § 450j-1(a)(2).

1190. *Shoshone-Bannock*, 1999 WL 562715 at *2. *See* Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306 (D. Or. 1997), *recons. denied*, 999 F. Supp. 1395 (D. Or. 1998).

1191. *Shoshone-Bannock*, 1999 WL 562715 at *2. Section 314 of the OCEA states that:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination and self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amount available for fiscal years 1994 through 1998 for such purposes . . . except that the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts, or annual funding agreements.

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681 (1998).

1192. *Shoshone-Bannock*, 1999 WL 562715 at *3. Section 328 of the OCEA states, in part, that "none of the funds in this act may be used to enter into any new or expanded self-determination contracts or grant or self-governance compact pursuant to the Indian Self-Determination Act of 1975, as amended, for any activities not previously covered by such contracts, compacts or grants." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 328.

1193. *Shoshone-Bannock*, 1999 WL 562715 at *3-*10. The court rejected this argument, holding that § 314 of the OCEA "cannot extinguish plaintiff's rights to CSC after they have fully vested, reveals no intent to be applied retroactively, and should not be interpreted to apply retroactively." *Id*. at *13.

1194. *Id*. at *10. The statute that established the Judgment Fund states that it is available "when . . . payment is not otherwise provided for." 31 U.S.C.A. §1304(a)(1) (West 1999).

1195. *Shoshone-Bannock*, 1999 WL 562715 at *10. The Appropriations Clause states that: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." U.S. CONST. art. I, § 9, cl. 7.

1196. *Shoshone-Bannock*, 1999 WL 562715 at *10.

1197. *Id*. at *12. The court noted that the Comptroller General repeatedly has rejected the argument that an agency's general appropriations fall within the "otherwise provided for" language in the statute that established the Judgment Fund. *Id*.

the ISDEA.[1198] As a result, the court could compel the government to pay the judgment through the Judgment Fund even if the court concluded that the OCEA prohibited the IHS from using its own appropriations to pay the FY 1996 and FY 1997 CSC claims.[1199]

Liability of Accountable Officers

The DOD Amends, Clarifies Rules Governing the Liability of "Accountable Individuals."[1200]

In August 1999, the DOD issued changes to volume 5 of the Financial Management Regulation (FMR).[1201] Noteworthy is the addition of several provisions throughout the volume that clarify certifying officer (CO) and disbursing officer (DO) liability, list the offices responsible for issuing advance decisions, and specify who may relieve COs and DOs from liability. The regulation provides specifically that a DO is not liable for properly certified but improper payments.[1202]

The amended FMR also delineates the DOD General Counsel, OPM, and the GSBCA as responsible for issuing advance decisions in certain cases. The Comptroller General's jurisdiction is limited to matters concerning the use of appropriated funds not reserved to the former authorities.[1203] Indeed, per the FMR, past Comptroller General decisions on matters now within the purview of the DOD OGC, OPM, or GSBCA, are "considered useful guidance and are not precedential."[1204] Finally, the FMR now makes clear that the DFAS Centers[1205] may relieve DOs and COs from liability for both physical losses and improper payments.[1206] Thus, as with advance decisions, the Comptroller General is no longer a major player in the DOD accountable individual process.

1198. *Id*. at *13.

1199. *Id*.

1200. Accountable individual, a new term, is a collective reference to all personnel who are certifying officers, disbursing officers, accountable officials, and others who are responsible for government funds. *See* U.S. DEP'T OF DEFENSE, REG. 7000.14-R, 5 FINANCIAL MANAGEMENT REGULATION (6 Aug. 1999), Definitions, para. 2 *available at* <http://www.dtic.mil/comptroller/fmr> [hereinafter FMR].

1201. *Id*.

1202. *Id*. ch. 1, para. 010501.C. Interestingly, this per se exemption appears to depart from the longstanding rule established by the courts and the GAO that accountable officers are strictly liable for losses of government funds. *See, e.g.*, United States v. Prescott, 44 U.S. 578 (1845); Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979); Department of State, B-238898, 70 Comp. Gen. 389 (Apr. 1, 1991). Of course, it is also well settled that those who are strictly liable may be relieved from liability if they were not negligent and did not act in bad faith. *See, e.g.*, Department of the Navy, B-238123, 70 Comp. Gen. 298 (Feb. 27, 1991).

1203. FMR, *supra* note 1200, ch. 1, para. 010403.B.2, and app. E. The DOD OGC is responsible for advance decisions relating to military pay, allowances, travel, transportation, retired pay, and survivors. The OPM issues decisions on civilian employee compensation and leave, and the GSBCA handles civilian employee travel, transportation, and relocation expenses and allowances. *See id.* vol. 5, app. E. Congress transferred advance decision authority in the instances cited to the Office of Management and Budget, which then authorized the listed agencies to issue decisions. *See* The General Accounting Office Act of 1996, Pub. L. 104-316, § 204, 110 Stat. 3826 (codified at 31 U.S.C. § 3529(b) (2)); *see also* Transfer of Claims Settlement and Related Advance Decisions, Waivers, and Other Functions, B-275605, Mar. 17, 1997, 97-1 CPD § 123 (providing a review of transfers of GAO authority).

1204. FMR, *supra* note 1200, ch. 1, para. 010403.B.2. The regulation also notes that agency regulations governing the disbursement of funds are binding on the Comptroller General. *See id*. para. 010403.B.3.

1205. The Centers are located in Denver (Air Force), Indianapolis (Army), Kansas City (Marine Corps), Cleveland (Navy), and Columbus, Ohio (Defense Agencies). *Id.* ch. 20.

1206. *See id*. ch. 6, paras. 060902, 060903, app. E.

Appendix A

DEPARTMENT OF DEFENSE LEGISLATION FOR FISCAL YEAR 2000

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2000[1]

President Clinton signed the Department of Defense Appropriations Act, 2000, on 25 October 1999. The Act appropriated approximately $267.7 billion to the Department of Defense (DOD) for fiscal year (FY) 2000.[2] This amount is approximately $17.2 billion more than Congress appropriated for FY 1999, and approximately $4.5 billion more than President Clinton requested for FY 2000.[3]

Forces to Be Supported[4]

Department of the Army

Congress appropriated approximately $22 billion for "Military Personnel, Army." This amount is sufficient to support an active force composed of 480,000 soldiers.[5]

Department of the Navy

Congress appropriated approximately $17.2 billion for "Military Personnel, Navy" and approximately $6.5 billion for "Military Personnel, Marine Corps." This amount is sufficient to support an active force composed of 372,037 sailors and 172,518 Marines.[6]

Department of the Air Force

Congress appropriated approximately $17.8 billion for "Military Personnel, Air Force." This amount is sufficient to support an active force composed of 360,877 airmen.[7]

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1. Pub. L. No. 106-79, 113 Stat. 1212 (1999). The joint conference report accompanying the Act requires the DOD to comply with the language and allocations set forth in the underlying House and Senate Reports unless they are contrary to the bill or joint conference report. H.R. CONF. REP. NO. 106-371, at 77 (1999). *See* H.R. REP. NO. 106-244 (1999); S. REP. NO. 106-53 (1999).

2. H.R. CONF. REP. NO. 106-371, at 266. The Act breaks down the appropriations as follows:

Military Personnel	$ 73,894,693,000
Operations and Maintenance	92,384,779,000
Procurement	52,980,714,000
Research, Development, Test and Evaluation	37,605,560,000
Revolving and Management Funds	807,544,000
Other DOD Programs	13,168,961,000

Id. at 78, 111, 161, 205, 252.

3. *Id*. at 266.

4. Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999).

5. *Id. See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 401, 113 Stat. 512 (1999). Congress also appropriated approximately $2.2 billion for "Reserve Personnel, Army." Department of Defense Appropriations Act, 2000, 113 Stat. at 1213.

6. Department of Defense Appropriations Act, 2000, 113 Stat. at 1212-13. *See* National Defense Authorization Act for Fiscal Year 2000, § 401. Congress also appropriated approximately $1.4 billion for "Reserve Personnel, Navy" and approximately $412 million for "Reserve Personnel, Marine Corps." Department of Defense Appropriations Act, 2000, 113 Stat. at 1213-14.

7. Department of Defense Appropriations Act, 2000, 113 Stat. at 1213. *See* National Defense Authorization Act for Fiscal Year 2000, § 401. Congress also appropriated approximately $1.5 billion for "Reserve Personnel, Air Force." Department of Defense Appropriations Act, 2000, 113 Stat. at 1214.

Emergency and Extraordinary Expenses

Congress gave the Secretary of Defense (SECDEF) and the service secretaries the authority to use a portion of their Operation and Maintenance (O&M) appropriations for "emergencies and extraordinary expenses."[8] In addition, Congress gave the SECDEF the authority to make $25 million of the Defense-wide O&M appropriation available for the Commander-in-Chief (CINC) initiative fund account.[9]

Overseas Contingency Operations[10]

Congress appropriated $1.7 billion for "expenses directly relating to Overseas Contingency Operations by U.S. military forces."[11] These funds remain available until expended; however, the SECDEF may transfer them only to the O&M accounts, the "Defense Health Program" account, or the "Defense Working Capital Fund" account.[12]

Overseas Humanitarian, Disaster, and Civic Aid

Congress appropriated $55.8 million for the DOD's Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) program.[13] These funds are available until 30 September 2001.

Quality of Life Enhancements

Like last year, Congress appropriated additional funds to remedy "unfunded shortfalls in the repair and maintenance of real property."[14] This year, however, Congress earmarked a portion of the appropriation for local educational facilities.[15] According to the Appropriations Act, the SECDEF must use the "Defense-Wide" portion of the appropriation to provide grants to local educational

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8. Department of Defense Appropriations Act, 2000, 113 Stat. at 1215. Congress capped this authority at $10,624,000 for the Army, $5,155,000 for the Navy, $7,882,000 for the Air Force, and $32,300,000 for the DOD. *Id*. *See* 10 U.S.C.A. § 127 (West 1999) (authorizing the SECDEF and the service secretaries to provide for "emergency and extraordinary expenses which cannot be anticipated or classified").

9. Department of Defense Appropriations Act, 2000, 113 Stat. at 1216. *See* 10 U.S.C.A. § 166a (allowing the Chairman of the Joint Chiefs of Staff to provide funds from the CINC Initiative Fund to combatant commanders for specified purposes).

10. Department of Defense Appropriations Act, 2000, 113 Stat. at 1218. This year's budget request lacked adequate justification data for overseas contingency operations. As a result, Congress directed the President to submit "separate budget justification documents for costs of United States Armed Forces' participation in contingency operations for the Military Personnel accounts, the Procurement accounts, and the Overseas Contingency Operations Transfer Fund" in future budget requests. *Id*. § 8110. *See* H.R. REP. NO. 106-244, at 111-12 (1999).

11. Department of Defense Appropriations Act, 2000, 113 Stat. at 1218. Congress specifically appropriated these funds for continuing operations in Bosnia and Southwest Asia. H.R. CONF. REP. NO. 106-371, at 157 (1999). Congress, however, reduced the Administration's request by approximately 28% because of the perceived misuse of the Overseas Contingency Operations Transfer Fund and the reduction in the number of personnel supporting continued operations in Bosnia. *See* S. REP. 106-53, at 38 (1999) (expressing the Committee's concern regarding the DOD's failure to establish a consistent policy for funding contingency operations).

12. Department of Defense Appropriations Act, 2000, 113 Stat. at 1218. The SECDEF may transfer funds back to the Overseas Contingency Operations Transfer Fund if he determines that they are necessary to the appropriations to which they were transferred. *Id*.

13. *Id*. at 1220. The DOD provides humanitarian, disaster, and civic aid to foreign governments pursuant to several statutes. *See, e.g.*, 10 U.S.C.A. §§ 401, 402, 404, 2547, 2551.

14. Department of Defense Appropriations Act, 2000, 113 Stat. at 1220. According to the House of Representatives Committee on Appropriations, the current backlog of real property maintenance projects is approximately $9.6 billion and growing. H.R. REP. NO. 106-244, at 63. Congress, however, only appropriated $300 million for quality of life enhancements, which it divided as follows:

Army	$77,000,000
Navy	77,000,000
Marine Corps	58,500,000
Air Force	77,000,000
Defense-Wide	10,500,000

Department of Defense Appropriations Act, 2000, 113 Stat. at 1220. These funds are available until 30 September 2001. *Id*.

15. Department of Defense Appropriations Act, 2000, 113 Stat. at 1220. Congress expanded the purpose and scope of this appropriation to avoid the limitations imposed in the Budget Enforcement Act on discretionary spending. *See* S. REP. NO. 106-53, at 14-15.

authorities to repair and improve educational facilities located on DOD installations and used primarily by DOD military and civilian dependents.[16]

Defense-Wide Procurement

Congress earmarked $6 million of the DOD's procurement appropriation for Electronic Commerce Resource Centers (ECRCs).[17] In addition, Congress appropriated $3 million for microwave power tube purchases under the Defense Production Act of 1950.[18]

Drug Interdiction and Counter-Drug Activities

Congress directed the DOD to transfer $10.8 million of its $847.8 million appropriation for drug interdiction and counter-drug activities to the "Military Construction, Air Force" account. The Air Force is supposed to use this money for construction planning and design activities at forward operating locations (FOLs) in the U.S. Southern Command's area of responsibility.[19]

End-of-Year Spending Limited

Congress again limited the ability of the SECDEF and the service secretaries to obligate funds during the last two months of the fiscal year to twenty percent of the applicable appropriation.[20]

Multi-Year Procurement Authority

Congress specifically authorized the service secretaries to award multi-year contracts for the AH-64 Apache Longbow helicopter,[21] the Javelin missile system,[22] the Abrams M1A2 upgrade program,[23] the F/A-18E/F Super Hornet aircraft,[24] the C-17 aircraft,[25] and the F-16 aircraft.[26] Congress, however, continued to limit the service secretaries' ability to award multi-year contracts for other items. For example, Congress prohibited the service secretaries from awarding multi-year contracts that: (1) exceed $20 million per

16. Department of Defense Appropriations Act, 2000, 113 Stat. at 1220. The Appropriations Act limits grants to a total of $1.5 million per local educational authority. *See id.* § 8151 (permitting the SECDF to use up to $5 million of the "Operation and Maintenance, Defense-Wide" account to provide grants to public school systems in which an unusually high concentration of special needs military dependents are enrolled).

17. *Id. See* H.R. REP. NO. 106-244, at 187 (noting that the Committee "has long supported the Electronic Commerce Resource Center (ECRC) program as a means to streamline acquisition procedures and reduce acquisition costs," but expressing its disappointment that the Administration requested significantly less funding for the ECRC program for FY 2000 than it did in FY 1999).

18. Department of Defense Appropriations Act, 2000, 113 Stat. at 1226. *See* Defense Production Act of 1950, 50 U.S.C.A. App. §§ 2078, 2091 2092, 2093 (West 1999); *see also* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 1063, 113 Stat. 512 (extending the Defense Production Act of 1950 through FY 2000). The DOD uses over 180,000 microwave power tubes to generate and amplify microwave energy in over 270 different types of radar, electronic warfare, and telecommunications operating systems. Unfortunately, reliable suppliers are difficult to find. As a result, Congress provided the additional funding to provide "assured access to affordable microwave tubes by incentivizing the insertion of consistent quality-driven improvements in the tube industry's supplier chains." H.R. REP. NO. 106-244, at 194.

19. Department of Defense Appropriations Act, 2000, 113 Stat. at 1229. *Cf.* National Defense Authorization Act for Fiscal Year 2000, §§ 2401(b), 2405(b)(2), 2407 (authorized the SECDEF to use $32 million of the "Military Construction, Defense-Wide" appropriation for "Drug Interdiction and Counter-Drug Activities" in Manta, Ecuador, but requiring the SECDEF to submit a report describing how he plans to obligate and expend those funds 30 days before he obligates them). The Administration requested $42.8 million to build FOLs in Costa Rica, Ecuador, and Curacao as part of its "Drug Interdiction and Counter-Drug Activities, Defense" request. *See* H.R. CONF. REP. NO. 106-226, at 14 (1999); H.R. REP. NO. 106-221, at 10 (1999); S. REP. NO. 106-74, at 20 (1999). This request troubled Congress for several reasons. First, the Administration developed its proposal outside the normal military construction process without adequate consensus regarding the overall requirements of the DOD's counter-narcotics mission in the region. Second, the Administration failed to give Congress a long-range master plan for each FOL. Finally, the Administration failed to identify which service was responsible for building and maintaining the FOLs. *See* S. REP. NO. 106-74, at 20. As a result, Congress directed the DOD to submit future budget requests for FOLs as part of its "Military Construction, Defense-wide" request. *See* H.R. REP. NO. 106-221, at 14. In addition, Congress directed the DOD to present project-level information for future FOL project requests "in Form 1391 detail." *Id.* Finally, Congress directed the DOD to realign Defense-wide planning and design funds to accomplish any planning and design work required for these FOLs. *Id.*

20. Department of Defense Appropriations Act, 2000, § 8004. This limitation does not apply to the active duty training of reservists, or the summer camp training of Reserve Officers' Training Corps (ROTC) cadets. *Id.*

21. Department of Defense Appropriations Act, 2000, § 8008. *See* S. REP. NO. 106-53, at 45 (1999) (expressing the Committee's belief that the Army's decision to reduce the inventory objective for AH-64 Apache Longbow helicopters is "short sighted and unaffordable" and directing the Army to develop an "affordable, fully budgeted plan" for the AH-64 Apache Longbow helicopter program).

year, or (2) provide for an unfunded contingent liability that exceeds $20 million.[27] In addition, Congress prohibited the service secretaries from awarding advance procurement contracts that will lead to multi-year contracts that exceed $20 million per year unless the service secretary notifies Congress thirty days in advance.[28] Finally, Congress prohibited the service secretaries from awarding multi-year contracts in excess of $500 million unless Congress specifically provides for the procurement in the Appropriations Act.[29]

A-76: The Beat Goes On

Congress still requires the DOD to conduct an OMB Circular A-76 cost study before it may contract out an activity performed by more than ten civilian employees.[30] In addition, Congress still requires the DOD to complete an A-76 cost study within twenty-four months for a single function activity, and forty-eight months for a multi-function activity.[31] This year, however, Congress added a new reporting requirement.[32] In an effort to determine whether the DOD's outsourcing and privatization efforts have saved any money,[33] Congress directed the SECDEF to submit a report on all of the A-76 studies that the DOD has conducted since 1995.[34]

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22. Department of Defense Appropriations Act, 2000, § 8008. *But see* H.R. CONF. REP. NO. 106-371, at 166 (1999) (prohibiting the Army from awarding a contract for the Javelin missile system until 30 days after the SECDEF certifies that the quantities being purchased are accurate and any outstanding technical and manufacturing issues have been resolved).

23. Department of Defense Appropriations Act, 2000, § 8008. *Cf.* National Defense Authorization Act for Fiscal Year 2000, § 111 (authorizing the Department of the Army to award multi-year contracts for the M2A3 Bradley fighting vehicle in addition to the AH-64 Apache Longbow helicopter, the Javelin missile system, and the Abrams M1A2 upgrade program). The conferees were reluctant to approve the Army's request for multi-year procurement authority for the Abrams M1A2 upgrade program because the proposed cost of the upgrade program is almost as high as the cost of procuring a new tank. H.R. CONF. REP. NO. 106-371, at 168-69. As a result, Congress prohibited the Army from awarding a multi-year procurement contract for the Abrams M1A2 upgrade program until 30 days after it submits a report to Congress describing its efforts to reduce production costs. Department of Defense Appropriations Act, 2000, § 8144. *See* H.R. CONF. REP. NO. 106-371, at 168-69 (detailing the contents of the report the Army must submit and urging the Army to reconsider its decision to commit to inefficient production rates). In addition, Congress directed the Secretary of the Army to submit an additional report by 15 June 2000 that explains the Army's rationale for deviating from the goal of equipping the "first to fight corps" with top line equipment. *Id*.

24. Department of Defense Appropriations Act, 2000, § 8008. *But see* National Defense Authorization Act for Fiscal Year 2000, § 121(requiring the Secretary of the Navy to submit a certification to Congress and wait 30 continuous days before awarding a multi-year contract and authorizing full-rate production of the F/A-18E/F Super Hornet aircraft).

25. Department of Defense Appropriations Act, 2000, § 8008. *But see id*. § 8145 (requiring the Secretary of the Air Force to certify that the average unit flyaway price of C-17 aircraft P121 through P180 will be at least 25% below the average unit flyaway price of C-17 aircraft under the current procurement program before initiating a new multi-year contract).

26. Department of Defense Appropriations Act, 2000, § 8008. *But see* National Defense Authorization Act for Fiscal Year 2000, § 809 (requiring the SECDEF to submit a report to the congressional defense committees before an agency head awards a multi-year contract).

27. Department of Defense Appropriations Act, 2000, § 8008. Congress also prohibited the DOD from awarding multi-year contracts unless it funds them to the limits of the government's liability. *Id*.

28. *Id*. Congress continued the requirement to provide 10-days advance notice before terminating a multi-year procurement contract. *Id*.

29. *Id*.

30. *Id*. § 8014. *See* FEDERAL OFFICE OF MANAGEMENT & BUDGET (OMB) CIR. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983).

31. Department of Defense Appropriations Act, 2000, § 8026.

32. *Id*. Congress also amended two statutes that affect the A-76 process in the Authorization Act. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, §§ 341, 342, 113 Stat. 512 (1999). In section 341, Congress amended 10 U.S.C. § 2461(b)(3)(B)(ii) to require a community impact assessment if more than 50 DOD employees perform the function being converted to private sector performance. *Id*. § 341. *See* Information Paper, subject: Impact of Pending Depot Maintenance Legislation (21 May 1999) [hereinafter Depot Maintenance Information Paper] (noting that this provision will further limit the Army's ability to manage its industrial operations). Then, in section 342, Congress added a new subsection to 10 U.S.C. § 2467. National Defense Authorization Act for Fiscal Year 2000, § 342. This new subsection requires the SECDEF to submit a report to Congress within 10 days if he decides to waive the cost comparison study required by OMB Circular A-76 as part of the process of converting a government function to private sector performance. *Id. See* Depot Maintenance Information Paper (noting that this provision will further restrict the Army's ability to efficiently manage its industrial manufacturing facilities and slow down the A-76 process).

33. *See* H.R. REP. NO. 106-244, at 70-71 (1999) (stating that "the cost savings benefits from the current outsourcing and privatization effort are, at best, debatable," and warning that the current privatization efforts have led to serious oversight problems); S. REP. NO. 106-53, at 15, 31-32 (1999) (expressing the Committee's concern that the DOD's projected A-76 savings have not matched its actual savings).

34. Department of Defense Appropriations Act, 2000, § 8109. The report must cover both A-76 studies of work performed by DOD employees and A-76 studies of work performed by DOD contractors. *Id.*

Military Installation Transfer Fund

Congress continued to authorize the SECDEF to enter into executive agreements that permit the DOD to deposit the funds it receives from North Atlantic Treaty Organization (NATO) member nations for returning overseas military installations to them into a separate account. The DOD may use this money to operate, maintain, and build facilities to support U.S. troops in those nations. Congress, however, must approve all construction projects in advance.[35]

Restrictions on Use of Appropriated Funds for United Nations Activities Lifted

Congress deleted the provision that barred the SECDEF from using appropriated funds to contribute to a United Nations peace-keeping activity or pay the United States' arrearages.[36]

TRICARE: Tell Me Where It Hurts

This year, Congress addressed TRICARE-related issues in several provisions of the Appropriations Act.[37] In section 8095, Congress authorized the SECDEF to extend TRICARE contracts for a period of two years if he determines that it is in the DOD's best interest to do so.[38] In addition, Congress authorized the DOD to award future TRICARE contracts for a period up to eight years.[39] In section 8118, Congress clarified the benefits available to TRICARE beneficiaries and the relationship between TRICARE and other medical care programs.[40] Finally, in section 8157, Congress directed the SECDEF to: (1) identify and determine the validity of outstanding healthcare claims, liabilities, and requests for equitable adjustments; and (2) establish a process for adjudicating claims and recognizing the DOD's actual liabilities in a timely and equitable manner.[41]

Failure to Notify Congress of "New Starts" Will Result in Forfeiture of Pay

Congress again prohibited the DOD from using appropriated funds to compensate employees who initiate "new start" programs without notifying the SECDEF, the OMB, and the congressional defense committees.[42]

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35. *Id*.

36. *Id*. § 8076.

37. *See, e.g., id.* §§ 8095, 8118, 8157. Congress also addressed TRICARE-related issues in several provisions of the Authorization Act. *See generally* National Defense Authorization Act for Fiscal Year 2000, §§ 701-707, 711-712, 714-715.

38. Department of Defense Appropriations Act, 2000, § 8095. This provision applies to contracts replacing contracts in effect–or in the final acquisition stages–on 30 September 1999. According to the Appropriations Act, the SECDEF is suppose to base the contract extension price on the contractor's best and final offer for the last year of the contract "as adjusted for inflation and other factors" to which the parties mutually agree. *Id.*

39. *Id.* The contract period may consist of a base year and up to seven one-year option periods. *Id. See* National Defense Authorization Act for Fiscal Year 2000, § 722 (adding 10 U.S.C. § 1073a, which requires the service secretaries to: (1) award health care contracts in excess of $5 million on a best value basis, and (2) give greater weight to technical and performance-related factors than to cost and price-related factors).

40. Department of Defense Appropriations Act, 2000, § 8118. TRICARE must provide its beneficiaries with access to all medically necessary health care–including custodial care–regardless of their status. *See id*. (defining "custodial care" as "care designed essentially to assist an individual in meeting the activities of daily living which does not require the supervision of trained medical, nursing, paramedical or other specially trained individuals"); *see also* 10 U.S.C.A. § 1079(a)(17) (West 1999) (permitting the SECDEF to establish an individual case management program–and authorize payment for comprehensive home health care services, supplies, and equipment–for individuals who have extraordinary medical or psychological disorders). In addition, TRICARE must serve as the primary payer for medically necessary health care for TRICARE beneficiaries. *See* Department of Defense Appropriations Act, 2000, § 8118 (noting that TRICARE takes precedence for payment purposes over title XIX of the Social Security Act, as well as other welfare or charity-based programs).

41. Department of Defense Appropriations Act § 8157. *See* National Defense Authorization Act for Fiscal Year 2000, § 713 (adding 10 U.S.C. § 1095c, which implements recommended changes to the TRICARE claims processing system); *id.* § 716 (adding 10 U.S.C. § 1097b, which provides for higher reimbursement if required to ensure the availability of an adequate number of health care providers and allows medical treatment facilities to collect from third-party payers). Congress expressed concern about the DOD's failure to act on adjustment requests submitted by TRICARE contractors. *See* H.R. CONF. REP. NO. 106-301, at 764 (1999). Congress believes that the DOD's failure to act on these requests in a timely manner is "a bad business practice and places both the contractors and the government in a fiscally precarious position." *Id*. Therefore, Congress directed the SECDEF to submit a report on the status of pending requests and the DOD's plan to eliminate any backlog by 1 March 2000. *Id*. Congress nevertheless cautioned the SECDEF not to construe these requirements as a mandate to pay unwarranted claims. Department of Defense Appropriations Act, 2000, § 8157.

Combating Terrorism

Congress expressed its concern regarding potential terrorist attacks by appropriating an additional $35 million to prevent, prepare for, and respond to terrorist attacks involving weapons of mass destruction.[43] In addition, Congress directed the SECDEF to upgrade the security of the Pentagon Reservation.[44]

Research, Development, Test, and Evaluation (RDT&E) Restrictions

Congress imposed several requirements and restrictions on the use of Defense-wide RDT&E appropriations this year. For example, Congress imposed a thirty-day advance notification requirement on the DOD for advanced concept technology demonstration programs.[45] In addition, Congress prohibited the DOD from using its Defense-wide RDT&E appropriations for the Line of Sight Anti-Tank Program[46] or the Medium Extended Air Defense System.[47]

Information Technology (IT)

Congress also imposed several requirements and restrictions on the use of appropriated funds for IT systems.[48] First, Congress prohibited the DOD from using appropriated funds for a mission critical or mission essential IT system after 31 March 2000 unless the DOD registers the system with the Chief Information Officer (CIO).[49] Second, Congress prohibited the DOD from granting Milestone I, II, or III approval to a "major automated information system"[50] unless the CIO certifies that the DOD is developing the system

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42. Department of Defense Appropriations Act, 2000, § 8096. A "new start" is a program "not previously justified and appropriated by the Congress through the normal budget process." U.S. DEP'T OF DEFENSE, REG. 7000.14-3, DEP'T OF DEFENSE FINANCIAL MANAGEMENT REGULATION, vol. 3, ch. 6, para. 060903 (Dec. 1996). The DOD Financial Management Regulation requires the DOD to notify Congress of all new starts. *Id*. This year, Congress added the requirement to notify the OMB. *See* H.R. REP. NO. 106-244, at 296 (1999).

43. Department of Defense Appropriations Act, 2000, § 8111. Congress divided the $35 million as follows:

Reserve Personnel, Army	$ 2,000,000
National Guard Personnel, Army	2,000,000
National Guard Personnel, Air Force	500,000
O&M, Army	24,500,000
RDT&E, Army	6,000,000

Id. Congress also earmarked portions of the O&M and RDT&E appropriations for specific projects, including the development of a counter-terrorism training program for first responders, the testing of response apparatus and equipment at the Memorial Tunnel, the development of an undergraduate research program for chemical and biological warfare defense, and the development of various distance learning programs and initiatives. *Id. See* National Defense Authorization Act for Fiscal Year 2000, § 1023 (authorizing the SECDEF to provide military assistance to civil authorities on a reimbursable basis if the Attorney General requests the assistance to respond to an act or threat of terrorism); *id.* § 1036 (directing the SECDEF to submit a report on the DOD's plans for establishing and deploying Rapid Assessment and Initial Detection (RAID) teams to respond to incidents involving weapons of mass destruction).

44. Department of Defense Appropriations Act, 2000, § 8064. Congress specifically directed the SECDEF to upgrade the security of secretarial offices and the subway entrance to the Pentagon Reservation. *Id*. *See* National Defense Authorization Act for Fiscal Year 2000, § 2873 (authorizing the SECDEF to design and construct secure secretarial office and support facilities and upgrade the security of the bus and subway entrances to the Pentagon Reservation).

45. Department of Defense Appropriations Act, 2000, § 8115. Congress specifically prohibited the DOD from obligating FY 2000 funds for such programs until 30 days after it submits a written report describing the project and its estimated costs. *Id.*

46. *Id*. § 8115. This prohibition applies to remaining FY 1999 funds. *Id*.

47. *Id*. § 8116.

48. *Id.* § 8121. The DOD Inspector General (IG) considers IT project management one of the DOD's "top ten most serious management problems," and the General Accounting Office (GAO) considers it a "high risk area." H.R. REP. NO. 106-244, at 196 (1999). Yet, the group responsible for overseeing IT investments has not met in more than a year and often approves systems despite a lack of essential documentation. *Id.*

49. Department of Defense Appropriations Act, 2000, § 8121. *See* 44 U.S.C.A. § 3506 (West 1999) (describing the duties and responsibilities of the CIO).

50. Department of Defense Appropriations Act, 2000, § 8121. *See* U.S. DEP'T OF DEFENSE, DIR. 5000.1, DEFENSE ACQUISITION (15 Mar. 1996) (defining a "Major Automated Information System (MAIS) Acquisition Program" as a program that "is (1) designated . . . as a MAIS; or (2) estimated to require program costs in any single year in excess of 30 million in fiscal year (FY) 1996 constant dollars, total program costs in excess of 120 million in FY 1996 constant dollars, or total life-cycle costs in excess of 360 million in FY 1996 constant dollars").

in accordance with the Clinger-Cohen Act of 1996.[51] Finally, Congress required the CIO to notify it of the funding baseline and milestone schedule for each certified system.[52]

Agencies Must Pay to Play

Congress took aim at "deadbeat agencies" in this year's Appropriations Act. Congress prohibited the DOD from using appropriated funds to provide support to other federal agencies that are more than ninety days in arrears on payments for goods and services provided on a reimbursable basis.[53]

Operations Desert Fox and Allied Force

Congress directed the SECDEF to submit a preliminary report regarding Operations Desert Fox and Allied Force by 15 December 1999, and a final report by 31 January 2000.[54] This report must review the successes and deficiencies of these operations.[55] In addition, this report must analyze the operations' impact on: (1) the readiness, warfighting capability, and deterrence value of the Unified Commands that transferred assets to the operations; and (2) the ability of the military to carry out the current national security strategy.[56]

Environmental Restoration

Congress appropriated approximately $1.6 billion for environmental restoration activities this year.[57] Yet, Congress did not appropriate this money without "strings attached." Congress limited the DOD's ability to obligate funds for environmental restoration under indefinite delivery/indefinite quantity (ID/IQ) contracts valued at $130 million or more to thirty-five percent of the total appropriation.[58] In addition, Congress prohibited the DOD from using appropriated funds to pay an environmental fine or penalty unless Congress specifically authorizes the payment.[59]

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51. Department of Defense Appropriations Act, 2000, § 8121. *See generally* 40 U.S.C.A. §§ 1401-1503 (West 1999) (detailing the requirements for IT management reform); *see also* H.R. REP. NO., at 106-244, 197 (noting that the DOD granted Milestone I and II approval to the Defense Joint Accounting System despite dramatic changes in the scope, cost, and duration of the project, and despite the DOD's failure to complete the program management process steps required for Milestone I review).

52. Department of Defense Appropriations Act, 2000, § 8121. Congress also required the CIO to confirm that the DOD has taken certain specified steps with respect to each certified system. *Id.* Congress is hoping that these additional requirements will instill some discipline into the process of approving IT projects for continued funding. H.R. REP. NO. 106-244, at 197-98.

53. Department of Defense Appropriations Act, 2000, § 8122.

54. *Id.* § 8125.

55. *Id.* Of particular interest are the requirements to review: (1) the process for identifying, nominating, selecting, and verifying targets; (2) the use and performance of military equipment, weapons systems, munitions, and national and tactical reconnaissance and surveillance assets; (3) equipment and capabilities that were in research and development, available but not introduced, or introduced but not used; (4) the interoperability of U.S. and other NATO aircraft; and (5) the deployment of Task Force Hawk. *Id.*

56. *Id.* In a related provision, Congress prohibited the use of any appropriated funds from this or any other act for reconstruction activities in the Republic of Serbia, excluding Kosovo, as long as Slobodan Milosevic remains the President of the Federal Republic of Yugosalvia. *Id.* § 8142.

57. Department of Defense Appropriations Act, 2000, 113 Stat. at 1218. Congress appropriated $378.1 million for "Environmental Restoration, Army," $284 million for "Environmental Restoration, Navy," $376.8 million for "Environmental Restoration, Air Force," $25.3 million for "Environmental Restoration, Defense-Wide," and $239.2 million for "Environmental Restoration, Formerly Used Defense Sites." *Id.*

58. *Id.* § 8130. Congress expressed concern that the use of large ID/IQ contracts may preclude local contractors and small businesses from participating in the DOD's environmental restoration efforts. H.R. CONF. REP. NO. 106-371, at 157-58 (1999); H.R. REP. NO. 106-244, at 113 (1999); S. REP. 106-53, at 39 (1999). As a result, Congress directed the SECDEF to submit quarterly reports that: (1) analyze the cost of and local contractor small business involvement in ID/IQ contracts, and (2) compare ID/IQ contracts to other contract options. H.R. CONF. REP. NO. 106-371, at 157-58; H.R. REP. NO. 106-244, at 113; S. REP. 106-53, at 39.

Congress Authorizes Pilot Program to Lease Aircraft

Congress authorized the Secretary of the Air Force to establish a multi-year pilot program to lease aircraft for operational support purposes.[60] Congress also authorized the Secretary of the Air Force to fund these leases with funds available at the time the lease agreements take effect, funds available at the time the lease payments are due, or funds appropriated specifically to make the lease payments.[61]

Congress Orders Side-by-Side Missile Tests

Congress directed the Secretary of the Army to use the AH-64D Apache Longbow helicopter to conduct a live fire, side-by-side operational test of the Starstreak and Stinger missiles.[62] In addition, Congress directed the Undersecretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) to review the need to acquire an air-to-air missile to protect AH-64 and RAH-66 helicopters from hostile forces.[63]

F-22 Compromise

One of the principal reasons Congress failed to pass the Appropriations Act by the beginning of the fiscal year was the inability of the House of Representatives and the Senate to agree on the Air Force's F-22 program.[64] Fortunately, Congress eventually agreed to a compromise that provides additional funding for testing while postponing production.[65] Under the compromise provision, the Secretary of the Air Force cannot award the initial procurement contract for the F-22 until: (1) the Air Force conducts additional test flights, (2) the Secretary of the Air Force certifies that the F-22 aircraft meets all of the Defense Acquisition Board exit criteria, and (3) the Director of Operational Test and Evaluation submits a report assessing the adequacy of the Air Force's testing.[66]

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59. Department of Defense Appropriations Act, 2000, § 8149. Congress specifically included supplemental environmental projects that the DOD carries out as part of a penalty in the prohibition against using appropriated funds to pay environmental fines and penalties. *Id. See* National Defense Authorization Act, Pub. L. No. 106-65, § 321, 113 Stat. 512 (1999) (extending the prohibition against using the "Environmental Restoration Account, Defense" to pay environmental fines and penalties through 2010). The full import of this provision is not yet known; however, the Office of the Deputy Chief of Staff for Logistics (ODCSLOG) has taken the position that:

> [Section] 8149 does not exempt DOD from paying fines. It requires that, before payment, DOD seek specific approval from Congress. The provision does allow review of an assessed fine within the Executive Branch. Any DOD request to pay a fine will first be part of a DOD budget request and be reviewed within the Administration.

Electronic Message from Brian S. Helmlinger, ODCSLOG/LESCO, subject: DISUM–Restrictions on Environmental Fines in the Defense Appropriations Act (31 Oct. 1999).

60. Department of Defense Appropriations Act, 2000, § 8133. This program is exempt from the requirements of 10 U.S.C. §§ 2401, 2401a. *Id*. § 8133(b). *See* 10 U.S.C.A. §§ 2401, 2401a (West 1999). The Secretary of the Air Force may lease up to six aircraft for up to 10 years; however, the Secretary of the Air Force may not enter into any lease agreements after 30 September 2004. Department of Defense Appropriations Act, 2000, § 8133(c)(2), (c)(9). In addition, the Secretary of the Air Force must notify Congress of the plans and proposed cost savings of the program 30 days in advance of the date the first lease agreement begins. *Id.* § 8133(c)(7).

61. Department of Defense Appropriations Act, 2000, § 8133.

62. *Id.* § 8138. Congress urged the Army to reprogram the funds required for the operational test from the AH-64D Apache helicopter program. H.R. CONF. REP. NO. 106-371, at 166. In addition, Congress directed the Army to: (1) compete any solicitation to develop, procure, or integrate air-to-air missiles for AH-64 or RAH-66 helicopters; and (2) include the requirement to conduct a live-fire, side-by-side operational test in the source selection criteria. Department of Defense Appropriations Act, 2000, § 8138. *See* George I. Seffers, *Army Plans Side-By-Side Missile Tests*, ARMY TIMES, Oct. 25, 1999, at 28-29 (detailing the Army's reluctance to conduct the live-fire shoot-off).

63. Department of Defense Appropriations Act, 2000, § 8138. This report is due no later than 31 March 2000. *Id*. *See* Seffers, *supra* note 62, at 28-29 (comparing the Starstreak, which is a laser-guided ground-to-air missile being adapted to for air-to-air use, and the Stinger, which is an infrared air-to-air missile that is combat proven and deployed or qualified worldwide on several aircraft).

64. Department of Defense Appropriations Act, 2000, § 8146.

65. *See House, Senate Negotiators Agree Upon $268 Billion Defense Spending Matters*, Fed. Cont. Daily (BNA) (Oct. 13, 1999), *available in* LEXIS News Library, BNAFCD file; *Congress Saves F-22 Program, Adds Money for R&D, More Testing but Delays Production*, Fed. Cont. Daily (BNA) (Oct. 6, 1999), *available in* LEXIS News Library, BNAFCD file.

66. Department of Defense Appropriations Act, 2000, § 8146. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 131, 113 Stat. 512 (1999) (imposing similar requirements).

Military Construction Transfer Fund Explained

In May 1999, Congress passed the 1999 Emergency Supplemental Appropriations Act.[67] This Act contained a provision entitled "Military Construction Transfer Fund," which provided $475 million for "emergency expenses incurred by United States military forces in support of overseas operations."[68] Congress clarified this provision in the current Appropriations Act by indicating that the DOD may transfer the previously appropriated funds only into military construction accounts.[69] Congress also specifically authorized all of the military construction projects it funded in the 1999 Emergency Supplemental Appropriations Act.[70]

National D-Day Museum Opening Declared an Official Event for Funding Purposes

Congress authorized the SECDEF to treat the opening of the National D-Day Museum in New Orleans, Louisiana, as an official event. As a result, the DOD may use appropriated funds to support ceremonies and activities related to the opening.[71]

Commission Established to Plan the Dwight D. Eisenhower Memorial

Finding that "the people of the United States feel a deep debt of gratitude to Dwight D. Eisenhower," Congress established a commission to plan a permanent memorial to preserve President Eisenhower's memory and perpetuate his contributions to the United States.[72] In addition, Congress appropriated $300,000 to fund the commission's activities.[73]

Base Efficiency Project

Congress authorized the Secretary of the Air Force to carry out a demonstration project known as the "Base Efficiency Project" at Brooks Air Force Base, Texas.[74] The purpose of this program is to "evaluate and demonstrate methods for more efficient operation of military installations through improved capital asset management and greater reliance on the public or private sector for less-costly base support services, where available."[75] Congress consequently authorized the Secretary of the Air Force to: (1) contract out services on a "best value" basis; and (2) lease, sell, or otherwise convey or transfer real or personal property located at the base.[76] Congress also established a revolving fund known as the "Base Efficiency Project Fund" to provide the funds necessary to pursue the project.[77]

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67. Pub. L. No. 106-31, 113 Stat. 57.

68. *Id*. ch. 6.

69. Department of Defense Appropriations Act, 2000, § 8152. Once transferred, the funds merge with and are available for the same purposes and time periods as the account to which the DOD transfers them. *Id*.

70. *Id.* § 8160.

71. *Id*. § 8161.

72. *Id*. § 8163.

73. *Id*. Among other things, Congress authorized the commission to award contracts and make expenditures for the goods and services required to carry out its mandate. *Id*. *See* Military Construction Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, §§ 2901-2902, 113 Stat. 512 (1999) (establishing and funding a "Commission on the National Military Museum" to study the need for–and make appropriate recommendations regarding–a national military museum in the National Capital Area).

74. Department of Defense Appropriations Act, 2000, § 8168. This authority expires on 30 September 2004. *Id*.

75. *Id*.

76. *Id*. The Secretary of the Air Force may accept either cash or in-kind consideration for a lease, sale, or other conveyance or transfer of real or personal property. *Id*.

77. *Id.* The funds in the Base Efficiency Project Fund are "no year" funds. Brooks Air Force Base must deposit any funds it receives as a result of the Base Efficiency Project into this fund, and it may use these funds only for purposes specified in the statute. *Id.*

Contract Payments

In an attempt to shield the military from a possible across-the-board cut in spending programs, Congress changed when the DOD makes contract payments this year.[78] First, Congress directed the DOD to make progress payments based on progress no less than twelve days after it receives a valid bill from a contractor.[79] Second, Congress directed the DOD to make progress payments based on cost no less then nineteen days after it receives a valid bill from a contractor.[80] Finally, Congress directed the DOD to adjust its payment policies and procedures to ensure that other contract payments are made no less than twenty-nine days after it receives a proper invoice from a contractor.[81]

Miscellaneous Special Interests

This year's Appropriations Act–like previous Appropriations Acts–contains a substantial amount of special interest funding. For example, Congress authorized or directed the DOD to fund: (1) the Young Marines program,[82] and (2) the transportation of medical supplies and equipment to American Samoa and the Indian Health Service on a non-reimbursable basis.[83] In addition, Congress directed the DOD to provide grants to: (1) "America's Promise—The Alliance for Youth, Inc.";[84] (2) the Nebraska Game and Parks Commission;[85] (3) the American Red Cross for Armed Forces Emergency Services;[86] and (4) the High Desert Partnership in Academic Excellence Foundation, Inc.[87] Finally, Congress prohibited the DOD from using appropriated funds to buy: (1) welded shipboard anchors and mooring chains four inches in diameter or under not manufactured in the United States from components manufactured substantially in the United States;[88] (2) carbon, alloy, or armor steel plates not melted or rolled in the United States or Canada;[89] (3) ball and roller bearings not "produced by a domestic source and of domestic origin";[90] (4) supercomputers not manu-

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78. *See* Rick Maze, *For Now, Congress Drops Plan for Military Pay Delay*, ARMY TIMES, Oct. 25, 1999, at 16. In addition to changing when the DOD makes contract payments, Congress declared $7.2 billion of the defense budget as "emergency" spending. Department of Defense Appropriations Act, 2000, § 8173. *See* Maze, *supra*, at 16.

79. Department of Defense Appropriations Act, 2000, § 8174. *See* U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 232.906 (Apr. 1, 1984) [hereinafter DFARS] (noting that the standard due date for progress payments is seven days after the receipt of a proper invoice). *But see* Consolidated Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (limiting the provision to billings received during the last month of the fiscal year).

80. Department of Defense Appropriations Act, 2000, § 8174. *See* DFARS, *supra* note 79, at 232.906 (noting that the standard due date for interim payments on cost type contracts is 14 days after the receipt of a proper invoice).

81. Department of Defense Appropriations Act, 2000, § 8175. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.601 (June 1997) (noting that the standard due date for contract payments is 30 days after the receipt of a proper invoice). *But see* Consolidated Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (limiting the provision to billings received during the last month of the fiscal year). In a related provision, Congress directed the DOD to use the funds that finance the operation of the responsible military department or defense agency to pay interest penalties associated with the untimely payment of an invoice or contract payment. Department of Defense Appropriations Act, 2000, § 8088.

82. Department of Defense Appropriations Act, 2000, § 8043. The money to fund this program comes from the "Drug Interdiction and Counter-Drug Activities, Defense" account. *Id.*

83. *Id.* § 8068.

84. *Id.* § 8106. The money to fund the $2.5 million grant for this program comes from the "Drug Interdiction and Counter-Drug Activities, Defense" account and is used to provide dollar-for-dollar matching funds "to mobilize individuals, groups and organizations to build and strengthen the character and competence of the Nation's youth." *Id.*

85. *Id.* § 8117. The money to fund the $250,000 grant for this program comes from the "Operation and Maintenance, Army" account and is used "for the purpose of locating, identifying the boundaries of, acquiring, preserving, and memorializing the cemetery site that is located in close proximity to Fort Atkinson, Nebraska." *Id.*

86. *Id.* § 8137.

87. *Id.* § 8148. The money to fund the $250,000 grant for this program comes from the "Operation and Maintenance, Defense-Wide" account and is used "for the purpose of developing, implementing, and evaluating a standards and performance based academic model at schools administered by the Department of Defense Education Activity." *Id.*

88. *Id.* § 8016.

89. *Id.* § 8035. This restriction applies to carbon, alloy, and armor steel plates procured for use: (1) in a government-owned facility, or (2) on a DOD-controlled property. *Id.*

90. *Id.* § 8067.

factured in the United States;[91] and ADC(X) class ships with main propulsion diesel engines and propulsors not manufactured in the United States by a "domestically operated entity."[92]

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2000[93]

President Clinton signed the National Defense Authorization Act for Fiscal Year 2000 on 5 October 1999.

Procurement

Family of Medium Tactical Vehicles (FMTV) Program

Congress prohibited the Army from awarding a contract to establish a second-source contractor for vehicles under the FMTV Program[94] and directed the Secretary of the Army to use competitive procedures to award the next FMTV contract.[95]

Helicopter Modernization

Congress directed the Secretary of the Army to submit a comprehensive plan for modernizing the Army's helicopter forces to the congressional defense committees.[96]

Research, Development, Test, and Evaluation

Defense Science and Technology Program

Congress believes that the SECDEF's failure to comply with previous funding objectives for the Defense Science and Technology Program may jeopardize the stability of the defense technology base and increase the risk that the DOD will lose its technical superiority in future weapons systems.[97] As a result, Congress encouraged the SECDEF to increase the budget for this program by at least two percent above the inflation rate for each of the next nine fiscal years.[98]

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91. *Id*. § 8069. The DOD may purchase supercomputers not manufactured in the United States if the SECDEF certifies that the acquisition is required "to acquire capability for national security purposes that is not available from United States manufacturers." *Id.*

92. *Id*. § 8105.

93. Pub. L. No. 106-65, 113 Stat. 512 (1999).

94. *Id*. § 112. The Army's FMTV second source production program would require a second source producer to build 588 vehicles. The Army's goal is to reduce the cost of vehicle components by encouraging the second source producer to propose innovative designs and modifications. The Army, however, has not produced substantive analysis to justify the second source production program. In fact, both the GAO and the U.S. Army Cost and Economic Analysis Center have opined that it will be difficult to achieve any cost savings through a second source production program. H.R. CONF. REP. NO. 106-301, at 591-92 (1999).

95. National Defense Authorization Act for Fiscal Year 2000, § 112. Congress also directed the Army to include the following items in its proposed acquisition strategy: (1) a validated technical data package (TDP) to serve as the baseline for FMTV configuration, (2) a requirement for competitors to warrant the TDP for their proposed vehicle, (3) a first article testing requirement for any proposed changes to the baseline TDP, and (4) a life cycle cost estimate. H.R. CONF. REP. NO. 106-301, at 592.

96. National Defense Authorization Act for Fiscal Year 2000, § 113. *See* H.R. CONF. REP. NO. 106-301, at 593-94 (expressing concern about the Army's ability to maintain its aging fleet of rotary wing aircraft given the growing number of obsolete parts). The Army may only obligate 90% of its aircraft appropriation until the Secretary of the Army submits the required report and 30 days elapse. National Defense Authorization Act for Fiscal Year 2000, § 113; H.R. CONF. REP. NO. 106-301, at 594.

97. National Defense Authorization Act for Fiscal Year 2000, § 212. *See* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 214(a), 112 Stat. 1948 (1998) (expressing the "sense of Congress" that the SECDEF should seek to increase the budget for the Defense Science and Technology Program by at least two percent above the inflation rate for each of the FYs 2000 through 2008).

98. National Defense Authorization Act for Fiscal Year 2000, § 212. If the SECDEF fails to comply with the specified funding objective, he must certify that the submitted budget does not have an adverse impact on the defense technology base, or the DOD's ability to maintain its technological superiority. In addition, the Defense Science Board must submit a report to the SECDEF and to Congress that assesses the effect of the SECDEF's failure to comply with the specified funding objective on defense technology and the national defense. *Id.*

Missile Defense

Congress expressed its continued interest in missile defense in several provisions of the Authorization Act this year. In section 232, Congress directed the SECDEF to establish an acquisition strategy for the two existing upper tier missile defense systems.[99] In section 236, Congress encouraged the SECDEF to seek adequate funding for both existing acquisition programs and future technology development programs for ballistic missile defense systems.[100] Finally, in section 237, Congress directed the SECDEF to submit a report to Congress regarding the advantages and disadvantages of deploying a ground-based National Missile Defense system at two sites.[101]

Cash Prizes Authorized for Outstanding Research and Development

Congress authorized the Director of the Defense Advanced Research Projects Agency (DARPA) to award cash prizes until 30 September 2003 for outstanding research and development efforts that have potential applicability to the DOD's military missions.[102]

Pilot Program to Revitalize DOD Laboratories

Congress authorized the SECDEF to carry out an additional pilot program to revitalize DOD laboratories.[103] Under this program, the SECDEF must select six laboratories that have demonstrated innovative management techniques to participate. These laboratories must then seek to attract "the finest scientific talent" and develop or expand innovative methods of providing cost effective research.[104]

Operation and Maintenance

Military Departments Required to Fund Defense Commissary Agency

Congress ordered each military department to transfer funds from its O&M account to the Defense Working Capital Fund account to support the Defense Commissary Agency.[105]

82d Airborne Division to Receive New Radios

Congress authorized the Secretary of the Army to use up to $5.5 million of its O&M appropriation to replace the 82d Airborne Division's non-tactical radios.[106]

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99. *Id.* § 232. The two separate systems are the Navy Theater Wide system and the Theater High-Altitude Area Defense (THAAD) system. *Id. See id*. § 233 (refining the acquisition strategy for the THAAD system). The Ballistic Missile Defense Organization (BMDO) proposed a revised upper tier acquisition strategy that would have created an artificial competition between the Navy Theater Wide system and the THAAD system. Under this strategy, the BMDO would have selected a lead upper tier system by December 2000 and concentrated future funding on that system. Congress, however, disagreed with this strategy. Congress noted that the two upper tier systems serve fundamentally different requirements with fundamentally different technological approaches. As a result, Congress directed the BMDO to proceed with the development and deployment of both systems as expeditiously as possible. H.R. CONF. REP. NO. 106-301, at 658-59, 670, 671.

100. National Defense Authorization Act for Fiscal Year 2000, § 236.

101. *Id.* § 237.

102. *Id*. § 244. The DARPA cannot award an individual prize that exceeds $1 million without the approval of the USD(AT&L). In addition, the DARPA cannot award prizes totaling more than $10 million per fiscal year. *Id*. *See* H.R. CONF. REP. NO. 106-301, at 674-75 (directing the DARPA to reserve the use of this authority for cases where "it determines, in consultation with the military services, that it is likely to serve as a significant incentive to develop technologies that are of high value to military end users").

103. National Defense Authorization Act for Fiscal Year 2000, § 245.

104. *Id.* The SECDEF must select one science and technology laboratory and one test and evaluation laboratory for each military department. *Id.*

105. *Id.* § 310. Congress ordered the Army to transfer $346,154,000, the Navy to transfer $263,070,000, the Marine Corps to transfer $90,834,000, and the Air Force to transfer $309,061,000. *Id*. *See* Karen Jowers, *Commissaries Need More Money to Stay Afloat*, ARMY TIMES, June 14, 1999, at 18 (indicating that the commissary system may go bankrupt without an infusion of cash).

Asbestos and Lead-Based Paint Abatement Contracts

Congress directed the SECDEF to consider using existing contract vehicles to remediate asbestos and lead-based paints at military installations within the United States.[107]

Customer Base for Defense Industrial Facilities Expanded

Congress amended 10 U.S.C. §§ 2208(j), 2553(c), and 2553(g) to give defense industrial facilities greater latitude to sell goods and services to purchasers outside the DOD.[108] The amendments allow the SECDEF to waive the prohibition against selling commercially available goods and services if the SECDEF determines that the waiver is necessary for national security reasons.[109] The amendments also clarify that a good or service is "not available" from a commercial source if it is not available "in the required quantity and quality or within the time required."[110]

Congress amended a number of statutes that affect depot-level maintenance and repair workloads. In section 333, Congress added a new subsection to 10 U.S.C. § 2466 that requires the SECDEF to submit an annual report on the percentage of depot maintenance funds the DOD spent for public or private sector performance of depot-level maintenance.[111] In section 334, Congress clarified the requirement to include both labor and material costs when determining whether the competition requirements mandated by 10 U.S.C. § 2469(a) apply.[112] In section 335, Congress added a new subsection to 10 U.S.C. § 2469a that generally prohibits the SECDEF and the service secretaries from imposing "significantly different" management requirements on public sector contractors.[113] Finally, in section 336, Congress amended section 346(a) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999.[114] This amendment requires the SECDEF to address the extent to which a proposed prime vendor complies with 10 U.S.C. § 2464 and 10 U.S.C. § 2466 in his report to Congress.[115]

Private Sector Services

Congress directed the SECDEF to submit a report to Congress by 1 March 2001 that describes its use of private sector sources to provide services during the previous fiscal year.[116] In addition, Congress directed the Secretary of the Air Force to submit a report to

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106. National Defense Authorization Act for Fiscal Year 2000, § 312.

107. *Id.* § 328. Congress specifically directed the SECDEF to consider using the U.S. Army Corps of Engineers' existing ID/IQ contracts. *Id. See* H.R. CONF. REP. NO. 106-301, at 712 (noting that the selected contract vehicle must provide the most cost-effective solution and 10 U.S.C. § 2304a(d)(3) establishes a statutory preference for ID/IQ contracts).

108. National Defense Authorization Act for Fiscal Year 2000, § 331. *See id.* § 332 (giving defense industrial facilities funded by defense working capital funds authority to provide services to private sector firms if the services are–or will be–incorporated into a defense contract).

109. *Id.* § 331.

110. *Id.*

111. *Id.* § 333 (adding 10 U.S.C. § 2466(e)). *Cf.* Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8037, 113 Stat. 1212 (1999) (permitting the DOD to acquire the "modification, depot maintenance and repair of aircraft, vehicles and vessels . . . through competition between [DOD] depot maintenance activities and private firms" and exempting such competitions from the requirements of OMB Circular A-76).

112. National Defense Authorization Act for Fiscal Year 2000, § 334 (amending 10 U.S.C. § 2469(b)).

113. *Id.* § 335 (adding 10 U.S.C. § 2469a(i)). The SECDEF and the service secretaries may impose "significantly different" requirements if the solicitation specifically provides for the requirements, or the requirements are necessary to comply with the contract terms. *Id. See* Depot Maintenance Information Paper, *supra* note 32 (noting that this provision will have not affect the Army because it only affects "workloads contracted out as a result of a BRAC 95 depot level activity realignment or closure").

114. National Defense Authorization Act for Fiscal Year 2000, § 336 (amending section 346(a) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999). Section 346a of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 requires the SECDEF to report on the costs, benefits, and expected savings of proposed prime vendor contracts. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-266, § 346(a), 112 Stat. 1979 (1998).

115. National Defense Authorization Act for Fiscal Year 2000, § 336. *See* 10 U.S.C.A. § 2464 (West 1999) (prohibiting the DOD from contracting out core logistics capabilities unless the SECDEF waives the prohibition and notifies Congress); *id.* § 2466 (limiting the portion of the depot-level maintenance and repair workload that the DOD may contract out).

Congress by 1 February 2000 identifying the programs the Air Force currently manages–or plans to manage–under the Total System Performance Responsibility Program or a similar program.[117]

The Army Wholesale Logistics Modernization Program

Congress believes that sustaining military readiness should be the primary goal of the Army Wholesale Logistics Modernization Program. Therefore, the program should require the use of "standard industry integration practices" to mitigate any risks to military readiness. In addition, the program should require the contractor to test any proposed solution rigorously. Finally, the Army should: (1) establish an implementation team to monitor the efficiency and effectiveness of the contractor's proposed solution; (2) retain sufficient in-house expertise to oversee the contractor's performance; and (3) encourage contract partnering to facilitate teamwork, enhanced communications, cooperation, and good faith performance.[118]

Military Readiness: How Are We Doing?

Concerns regarding military readiness permeate the Authorization Act. One consequence of this concern is the flood of new studies and reports Congress is requiring this year. For example, the SECDEF must study and report on the DOD's readiness reporting system[119] and the DOD's secondary inventory shortages.[120] In addition, the Comptroller General must study and report on the adequacy of the DOD's restructured sustainment and reengineered logistics product support practices.[121]

Congress Authorizes Installation of Telephone Lines and Telecommunication Equipment in Certain Residences

Federal agencies normally may not use appropriated funds to install telephones in private residences.[122] Congress, however, authorized the services secretaries to: (1) install telephone lines and necessary telecommunication equipment in the private residences of certain volunteers,[123] and (2) pay any charges associated with the authorized use of the equipment.[124]

Smart Cards: The Wave of the Future

Congress designated the Department of the Navy as the lead agency for the development and implementation of a Smart Card program.[125] The Navy must develop a business plan to implement the use of Smart Cards in one major naval region on each coast by 1 November 1999.[126]

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116. National Defense Authorization Act for Fiscal Year 2000, § 343.

117. *Id.* § 344.

118. *Id.* § 345.

119. *Id.* § 361.

120. *Id.* § 362. *See id.* § 363 (requiring the SECDEF to submit a report regarding the inventory and control of the DOD's military equipment).

121. *Id.* § 364. *See id.* § 365 (requiring the Comptroller General to review the effect the consistent lack of adequate funding for real property maintenance has had on military readiness, quality of life, and installation infrastructures).

122. 31 U.S.C.A. § 1348(a)(1) (West 1999).

123. National Defense Authorization Act for Fiscal Year 2000, § 371 (adding 10 U.S.C. § 1588(f)). The volunteers covered by this amendment are those who provide: (1) medical, dental, nursing, or other health-care related services; (2) volunteer services for a museum or natural resources program; or (3) volunteer services for programs that support service members and their families. *Id. See* 10 U.S.C.A. § 1588(a) (West 1999).

124. National Defense Authorization Act for Fiscal Year 2000, § 371. The service secretaries may use either appropriated or nonappropriated funds to pay the installation and use charges. *Id. See* H.R. CONF. REP. NO. 106-301, at 719 (noting that the equipment is for "official use in connection with the voluntary service provided").

Military Personnel Policy

Aviator Recall

In response to reported personnel shortages,[127] Congress authorized the service secretaries to recall up to 500 retired aviators to active duty to fill staff positions.[128] The recall period begins on 1 October 1999 and ends on 30 September 2002.[129]

Advanced Degrees Authorized

Students attending the Army War College or the Air War College may now receive a "master of strategic studies" degree.[130] Similarly, students attending the Air Command and Staff College may now receive a "master of military operational air and science" degree, and students attending the School of Advanced Airpower Studies may now receive a "master of airpower art and science" degree.[131]

Reserve Officer Training Corps (ROTC) Matters

Congress included several provisions in the Authorization Act that affect ROTC cadets. First, Congress authorized the service secretaries to award a limited number of scholarships to ROTC cadets and midshipmen who pursue a post-baccalaureate degree.[132] Second, Congress increased the monthly subsistence allowance for senior ROTC cadets to $200 per month.[133] Finally, Congress consolidated and recodified the statutory provisions that prohibit the DOD from providing funds by contract or grant to educational institutions that prevent ROTC access or military recruiting on campus.[134] The consolidated provisions now appear at 10 U.S.C. § 983.[135]

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125. National Defense Authorization Act for Fiscal Year 2000, § 373. A "Smart Card" is defined as:

> [A] credit card-size device, normally for carrying and use by personnel, that contains one or more integrated circuits and may also employ one or more of the following technologies:
>
> (A) Magnetic strip.
> (B) Bar codes, linear or two-dimensional.
> (C) Non-contact and radio frequency transmitters.
> (D) Biometric information.
> (E) Encryption and authentication.
> (F) Photo identification.

Id. The purpose of the Smart Card program is to enhance readiness and improve business processes. *Id.*

126. *Id*. Congress authorized the Department of the Navy to use up to $30 million to implement the Smart Card program. *Id*. *See id* § 374 (directing the SECDEF to submit a report evaluating the possibility of using the Smart Card as a Public-Private Key Infrastructure (PKI) authentication device carrier that "physically stores, carries, and employs electronic authentication or encryption keys necessary to create a unique digital signature, digital certificate, or other mark on an electronic document or file").

127. *See* GENERAL ACCOUNTING OFFICE, MILITARY PERSONNEL: ACTIONS NEEDED TO BETTER DEFINE PILOT REQUIREMENTS AND PROMOTE RETENTION, GAO/NSIAD-99-211 (Aug. 20, 1999) (noting that the DOD reported a shortage of 2000 pilots at the end of FY 1998); *see also* William Matthews, *Bigger Bonuses No Guarantee Pilots Will Remain in Cockpits*, ARMY TIMES, July 5, 1999, at 18 (indicating that the Army was short 104 Apache helicopter pilots at the end of FY 1998; the Navy was short 1150 pilots; the Air Force was short 648 pilots; and the Marine Corps was short 46 pilots).

128. National Defense Authorization Act for Fiscal Year 2000, § 501. The identified aviators must consent to the recall. *Id*.

129. *Id.* The service secretaries must release any recalled aviators from active duty by 30 September 2003. *Id*.

130. *Id.* § 542 (adding 10 U.S.C. § 4321); *id.* § 543 (amending 10 U.S.C. § 9317).

131. *Id.* § 543 (amending 10 U.S.C. § 9317).

132. *Id*. § 545 (amending 10 U.S.C. § 2107(c)(2)). The number of graduate-level scholarships a service secretary may award is limited to 15% of the total number of scholarships awarded in a given year. *Id*.

133. *Id.* § 546.

The Office of the Coast Guard Reserve: Welcome Aboard

Congress created the Office of the Coast Guard Reserve.[136] The Director of the Coast Guard Reserve will serve as the principal adviser to the Commandant of the Coast Guard on reserve matters. In addition, the Director of the Coast Guard Reserve will be responsible for the "preparation, justification, and execution of the personnel, operation and maintenance, and construction budgets for the Coast Guard Reserve."[137]

Military Recruiting Initiatives

All of the military departments had difficulty meeting their recruiting goals for FY 1999.[138] As a result, Congress included several provisions in the Authorization Act to assist military recruiters.[139] First, Congress requested local educational agencies to grant military recruiters the same access to secondary school students that they grant to post-secondary educational institutions and prospective employers.[140] Second, Congress extended the delayed entry program period to 365 days.[141] Third, Congress authorized the Secretary of the Army to establish a pilot program known as "Army College First" to "assess whether the Army could increase the number of, and the level of the qualifications of, persons entering the Army as enlisted members by encouraging recruits to pursue higher education or vocational or technical training before entry into active service in the Army."[142] Finally, Congress authorized the SECDEF to use recruiting materials for public relations purposes.[143]

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134. *Id.* § 549 (amending 10 U.S.C. § 983 and repealing section 558 of the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), and section 514 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208; 110 Stat. 3009 (1996)). The funds affected by this provision include funds made available to: (1) the DOD; (2) the Department of Labor, the Department of Health and Human Services, Department of Education, and related agencies; and (3) the Department of Transportation. *Id*.

135. *Id*. The new provision does not apply to educational institutions that: (1) have ceased the prohibited policy or practice, or (2) have a longstanding policy of pacifism based on historical religious affiliations. *Id.*

136. *Id.* § 557 (adding 14 U.S.C. § 53).

137. *Id.*

138. *See* Jane McHugh, *Monthly Recruiting Sign-ups Worst in 26 Years*, ARMY TIMES, July 26, 1999, at 8 (estimating that the Army will miss its annual recruiting mission by 7500); *cf.* Jim Tice, *Close Call: Record Retention Slows Manpower Crisis*, ARMY TIMES, Oct. 18, 1999, at 8 (noting that the Army ended FY 1999 with 479,100 active-duty soldiers because of "[a] spectacular re-enlistment campaign, combined with a sharp downturn in attrition among first-term soldiers and recruits in the delayed-entry program").

139. National Defense Authorization Act for Fiscal Year 2000, § 557. The conferees recommended an additional $399.2 million for the military personnel and O&M accounts to support the DOD's recruiting, advertising, and retention programs. H.R. CONF. REP. NO. 106-371, at 79 (1999). In addition, the conferees recommended additional funds for the following programs:

Enlistment Bonuses	$88,200,000
Selective Reenlistment Bonuses	74,000,000
Student Loan Repayment Program	4,000,000
Navy College Fund	5,000,000
Recruiting and Advertising	78,000,000
Recruiting Support	27,000,000
College First Program	7,000,000
Tuition Assistance	6,000,000
Aviation Continuation Pay	110,000,000

Id.

140. National Defense Authorization Act for Fiscal Year 2000, § 571 (adding 10 U.S.C. § 503(c)).

141. *Id.* § 572 (amending 10 U.S.C. § 513(b)(1)).

142. *Id.* § 573. The pilot program begins on 1 October 1999 and ends on 30 September 2004. Under this program, the Secretary of the Army may: (1) delay the enlistment of a recruit for a period of two years while the recruit pursues either a post-secondary education, or vocational or technical training; and (2) pay the recruit a monthly allowance of $150 during the delay period. *Id*.

143. *Id.* § 574 (adding 10 U.S.C. § 2257).

Exit Survey

The SECDEF must survey all military personnel who leave the Armed Forces voluntarily between 1 January 2000 and 30 June 2000 regarding their attitudes toward military service.[144] At a minimum, the survey must address the service member's: (1) reasons for leaving the military; (2) opinion regarding the command climate; (3) attitude toward leadership; (4) attitude toward pay and benefits; (5) job satisfaction; (6) future plans; and (7) plans to join the reserves, if any, and the reasons for the decision.[145]

Childcare Subsidies

The SECDEF may now use O&M funds to provide financial assistance to civilians who provide childcare and youth program services to service members and DOD employees if he determines that providing the assistance: (1) is in the DOD's best interests; (2) will supplement rather than supplant existing services; and (3) will ensure that the service provider complies with applicable regulations, policies, and standards.[146] In addition, the SECDEF may now authorize currently ineligible children to participate in the DOD's childcare and youth programs on a space available basis.[147]

Operation Tempo Relief

The operation tempo during the past several years has placed a strain on military morale and resources.[148] This year Congress provided some relief.[149] First, Congress directed the lowest-ranking general or flag officer in a service member's chain-of-command to ensure that the service member is not deployed[150] for more than 220 days out of the preceding 365 days[151] if the service member qualifies as a "high-deployment days member."[152] In addition, Congress directed the service secretaries to pay a "high-deployment

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144. *Id.* § 581.

145. *Id. See* William Matthews, *Retention: Not Just Pay,* ARMY TIMES, Oct. 4, 1999, at 27 (noting that dissatisfaction with "work circumstances" (e.g., equipment shortages, undermanned units, frequent deployments, and long work hours) are driving more service members out of the military than dissatisfaction with pay).

146. National Defense Authorization Act for Fiscal Year 2000, § 584 (redesignating 10 U.S.C. § 1798 as 10 U.S.C. § 1800 and adding a new 10 U.S.C. § 1798). To be eligible for assistance, the service provider must: (1) be licensed to provide the services under State or local law, (2) have provided such services previously to service members or DOD employees, and (3) be either a family home day care provider or an authorized family childcare provider. *Id. See* Karen Jowers, *Using Civilians to Ease the Child-Care Crunch*, ARMY TIMES, June 14, 1999, at 20.

147. National Defense Authorization Act for Fiscal Year 2000, § 584. The underlying goals of this provision are to: (1) integrate military children into the civilian community, (2) make more efficient use of DOD resources and facilities, and (3) establish partnership or consortium arrangements with schools and other youth services organizations that serve military children. *Id.*

148. *See* Linda D. Kozaryn, *Shelton, Chiefs to SASC: Optempo, Limited Funds Erode Readiness*, AM. FORCES PRESS SERV., Oct. 28, 1999 ("More than 120,000 service members are deployed worldwide supporting exercises, theater engagements, forward presence commitments and 20 ongoing operations.").

149. National Defense Authorization Act for Fiscal Year 2000, § 586 (adding 10 U.S.C. § 991 and 37 U.S.C. § 435). *See id*. § 923 (making the Under Secretary of Defense for Personnel and Readiness responsible for monitoring operations and personnel tempos and requiring the SECDEF to report on various aspects of the operations and personnel tempos in his annual report to Congress); *see also id*. § 675 (permitting the service secretaries to pay all of a service member's tuition and expenses if the service member is serving in a contingency operation and has enrolled in an off-duty educational or training program); *id.* § 677 (expressing the "sense of Congress" that the Internal Revenue Service should treat any special pay a service member receives while assigned to support a contingency operation the same as the pay a service member would receive while serving in a combat zone).

150. *Id.* The new provision defines the term "deployment" to include

> any day on which, pursuant to orders, the member is performing service in a training exercise or operations at a location or under circumstances that make it impossible or infeasible for the member to spend off-duty time in the housing in which the member resides when on garrison duty at the member's permanent duty station.

Id. The term does not, however, include days on which the member is attending school or "performing administrative, guard, or detail duties in garrison at the member's permanent duty station." *Id*.

151. *Id*. The new provision specifically directs the lowest-ranking general or flag officer to ensure that a service member "is not deployed, or continued in a deployment, on any day on which the total number of days on which the member has been deployed out of the preceding 365 days would exceed 220 days . . . ." *Id.* The new provision, however, specifies two exceptions. First, a general or admiral in the member's chain-of-command may approve the member's deployment or continued deployment. In addition, the SECDEF may waive the new requirements if he determines that it is in the national security interests of the United States to do so. *Id.*

152. *Id.* The new provision defines a "high-deployment days member" as "a member who has been deployed 182 days or more out of the preceding 365 days." *Id*.

per diem allowance" of $100 per day for each day a service member is deployed in excess of 250 days out of the preceding 365 days.[153] These provisions do not take effect until 1 October 2000 and 1 October 2001, respectively.[154]

Compensation and Other Personnel Benefits

Improving recruiting and retention was a top legislative priority this year.[155] As a result, Congress authorized a number of personnel initiatives. These initiatives included pay raises, retirement reforms, and increased funding for bonuses and incentive payments.[156]

Pay Raises[157]

Congress authorized a 4.8% pay raise, effective 1 January 2000, to "keep military compensation attractive, help ensure that military pay is competitive with private sector wages, and enable the services to continue to attract and retain a highly qualified volunteer force."[158] In addition, Congress revised the basic pay tables to "reduce pay compensation between grades, eliminate inconsistencies in the pay table, and increase incentives for promotion."[159] The revised basic pay table takes effect on 1 July 2000, and will affect service members differently depending on their pay grade and years of services.[160] Finally, Congress authorized pay raises for FY 2001 through FY 2006 equal to one-half of a percent above the Employment Cost Index (ECI).[161]

Bonuses and Incentive Payments

Congress authorized bonuses and incentive payments for several specialty branches and military occupational specialties.[162] For example, Congress authorized continuation pay for active duty judge advocates for the first time ever.[163] Judge advocates who meet the eligibility requirements[164] and are willing to execute a written agreement to remain on active duty for a specified period may now receive up to $60,000.[165]

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153. *Id*. The new provision specifically requires the service secretary to pay a service member "a high-deployment per diem allowance . . . for each day on which the member (1) is deployed, and (2) has, as of that day, been deployed 251 days or more out of the preceding 365 days." *Id*.

154. *Id*. A service member cannot count any day prior to 1 October 2000 as a day on which the service member was deployed for purposes of the new provision. *Id*. *See* Rick Maze, *Better Paychecks, Better Retirement*, ARMY TIMES, Aug. 9, 1999, at 9 (indicating that Congress delayed the implementation date to give the DOD–which opposed the allowance–time to decrease deployments or convince Congress to repeal the new provision).

155. *See* H.R. REP. NO. 106-244, at 33 (1999).

156. *Id*. at 33, 35. *See* National Defense Authorization Act for Fiscal Year 2000, § 673 (requiring the SECDEF to submit an annual report regarding what, if any, effect the improved pay and benefits have had on the ability of the military departments to recruit and retain service members).

157. National Defense Authorization Act for Fiscal Year 2000, §§ 601-602. *See id*. § 603 (earmarking $225 million of military personnel appropriations for further increases in the Basic Allowance for Housing within the United States); *see also id*. § 632 (authorizing the service secretaries to reimburse enlisted service members for temporary lodging expenses at their first permanent duty station).

158. *Id*. *See* S. REP. NO. 106-53, at 8 (1999). The approved raise is 0.4% higher than the requested raise and constitutes the largest pay raise service members have received since 1981. *See* Maze, *supra* note 154, at 8; *see also* Rick Maze, *Pay Plan Explained: What It Means to You*, ARMY TIMES, Sept. 20, 1999, at 18.

159. National Defense Authorization Act for Fiscal Year 2000, § 601. *See* H.R. CONF. REP. NO. 106-301, at 750 (1999); *see also* Jim Garamone, *All Win With Pay Raise, Pay Table Reforms*, AM. FORCES PRESS SERV., Sept. 28, 1999 (noting that promotions will account for 53% of raises and longevity will account for 47% of raises after the revised pay tables take effect); Rick Maze, *Targeted Raises: Do They Miss the Mark? Enough People Think So to Put Pentagon Officials on the Defensive*, ARMY TIMES, Sept. 13, 1999, at 8-9 (indicating that the adjustments will make the reward for promotion greater than the reward for longevity).

160. National Defense Authorization Act for Fiscal Year 2000, § 601. Under the revised pay tables, approximately 80% of all service members will receive a raise in July 2000; however, the average raise will be only 1.4%. Less than 7000 service members will receive the maximum 5.5% raise, and mid-career Majors, Lieutenant Colonels, and Colonels will receive most of the larger raises. *See* Maze, *supra* note 159, at 8-9; *see also* Maze, *supra* note 158, at 18.

161. National Defense Authorization Act for Fiscal Year 2000, § 602 (amending 37 U.S.C. § 1009(c)). The authorized raises are meant to shave up to two percentage points off the "pay gap" between military and civilian wages by 2006. *See* Rick Maze, *Congress May Approve Plan to Decrease Pay Gap*, ARMY TIMES, July 12, 1999, at 20.

162. *See generally* National Defense Authorization Act for Fiscal Year 2000, §§ 611-28.

163. *Id*. § 629 (adding 5 U.S.C. § 321). Congress also directed the SECDEF to study the need for additional incentives to assist the military departments recruit and retain judge advocates. Potential incentives include constructive service credit for basic pay and student loan relief and repayment programs. *Id*.

Congress Retires Redux

Congress amended the Redux retirement plan.[166] As a result, service members who joined the military after 1 August 1986 now have two options.[167] These service members may elect to retire under the pre-1986 retirement plan,[168] or they may elect to receive a lump sum bonus of $30,000 when they reach fifteen years of active duty service[169] and remain under the Redux retirement plan.[170]

Congress Dumps Dual Compensation Rules

In a related measure, Congress repealed 5 U.S.C. § 5532.[171] Therefore, retired service members no longer have to give up a portion of their retired pay if they work for a federal agency after their retirement.[172]

Thrift Savings: A Plan Without a Future?

Active duty service members and members of the Ready Reserve may participate in the federal government's Thrift Savings Plan.[173] In addition, the service secretaries may contribute to the Thrift Savings Fund on behalf of a service member in a critical specialty if the service member agrees to continue to serve on active duty for an additional six years.[174] Unfortunately, Congress postponed the effective date of the new legislation until the date it enacts qualifying offsetting legislation or one year from effective date of the National Defense Authorization Act for FY 2000, whichever is later.[175] Congress will consider passing the offsetting legislation, however, only if the President proposes such legislation in the FY 2001 budget request.[176]

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164. *Id.* The new statute defines an "eligible judge advocate" as an active duty judge advocate who has completed his initial active duty service obligation. *Id.*

165. *Id.*

166. *Id.* § 641 (amending 10 U.S.C. § 1409); *id.* § 642 (adding 37 U.S.C. § 322). *See* H.R. CONF. REP. NO. 106-301, at 755-56 (1999). The acronym "Redux" is the popular name for the Military Retirement Reform Act of 1986. *See* Rick Maze, *At Last, Taps for Redux*, ARMY TIMES, Aug. 9, 1999, at 9.

167. National Defense Authorization Act for Fiscal Year 2000, § 641 (amending 10 U.S.C. § 1409); § 642 (adding 37 U.S.C. § 322). The DOD has a new web site (i.e., <http://pay2000.dtic.mil>) that explains the military pay changes. This web site should allow service members to calculate and compare their retirement benefits under each option by the end of the year. *See* Douglas J. Gillert, *New Web Site Adds Up Military Pay Gains*, AM. FORCES PRESS SERV., Oct. 29, 1999. Commentators generally agree that the value of the bonus will depend on how a service member plans to use it. Service members may meet or exceed the estimated $60,000 in lifetime retired pay they will forfeit if they invest the bonus and allow it to grow. *See* Maze, *supra* note 166, at 9.

168. National Defense Authorization Act for Fiscal Year 2000, § 641 (amending 10 U.S.C. § 1409). Under the pre-1986 retirement plan, the DOD computes a service member's retired pay by multiplying the service member's years of creditable active duty service by 2.5%. 10 U.S.C.A. § 1409(b)(1) (West 1999). This plan is known as "High 3." *See* Maze, *supra* note 166, at 9.

169. National Defense Authorization Act for Fiscal Year 2000, § 642 (amending 37 U.S.C. § 322). Service members electing to receive the bonus must execute a written agreement to remain on active duty until they have completed 20 years of creditable active duty service. *Id*. Service members who then fail to complete 20 years of creditable active duty service must repay a pro-rata share of the bonus unless the service secretary waives the requirement. *Id.*

170. *Id.* § 641 (amending 10 U.S.C. § 1409). Under the Redux retirement plan, the DOD reduces a service member's retired pay multiplier by: (1) one percent for each full year of creditable active duty service less than 30; and (2) 1/12 of one percent for each month of creditable active duty service less than a full year. 10 U.S.C.A. § 1409(b)(2). In addition, the DOD caps the service member's annual cost-of-living adjustment at one percentage point below inflation. *See* Rick Maze, *Retirement Choice Required at 15-Year Mark*, ARMY TIMES, Oct. 18, 1999, at 32.

171. National Defense Authorization Act for Fiscal Year 2000, § 651 (repealing 5 U.S.C. § 5532).

172. *Id.* The dual-compensation law imposed two restrictions on retirees. First, the law required retired military officers to forfeit 50% of their annual military retired pay over $10,450.77. Second, the law capped the total pay retired service members could receive from their combined military retired pay and federal salaries at $110,700. *See* Staff Sergeant Michael Dorsey, *Congress Scrutinizes 'Double-Dipping' Ban*, AIR FORCE NEWS, Aug. 18, 1999; *cf.* Rick Maze, *'Double-Dipper' Provision Removed From Defense Bill*, ARMY TIMES, July 5, 1999, at 21.

173. National Defense Authorization Act for Fiscal Year 2000, § 661 (adding 37 U.S.C. §§ 221, 8440e). *But see* William Matthews, *Excessive Fees Could Wipe Out Savings Plan*, ARMY TIMES, Nov. 22, 1999, at 22 (projecting that the annual administrative fees for active duty service members and reservists will total 1.5% and 8.4%, respectively).

174. National Defense Authorization Act for Fiscal Year 2000, § 662 (adding 37 U.S.C. § 221(d)).

175. *Id*. § 663. The SECDEF may postpone the authority of members of the Ready Reserve to participate in the Thrift Savings Plan for 180 days if the SECDEF determines that allowing members of the Ready Reserve to participate immediately would place an excessive burden on the Federal Retirement Thrift Investment Board. *Id*.

Prototype Project Agreements Subject to Audit

In 1994, Congress authorized the Director of the Advanced Research Projects Agency to carry out prototype projects for weapons and weapons systems that the DOD plans to acquire or develop.[177] This year, Congress amended the statute to require the DOD to include an audit clause in agreements to carry out prototype projects if the agreement calls for payments greater than $5 million. This clause will permit the Comptroller General to examine the records of any party to the agreement, as well as any entity that participates in performing the agreement.[178] The requirement, however, does not apply to "a party or entity . . . that has not entered into any other agreement that provides for audit access by a Government entity in the year prior to the date of the agreement."[179]

Applicability of Cost Accounting Standards (CAS) Streamlined

Congress "streamlined" CAS applicability in several ways this year.[180] First, Congress excluded from CAS coverage firm-fixed-price contracts and subcontracts "awarded on the basis of adequate price competition without submission of certified cost or pricing data."[181] Second, Congress added a "trigger" provision that exempts contracts and subcontracts valued at less than $7.5 million from CAS coverage if the contractor or subcontractor does not have another CAS-covered contract valued at more than $7.5 million.[182] Third, Congress authorized the head of an executive agency to waive CAS applicability: (1) for contracts and subcontracts valued at less than $15 million with contractors or subcontractors that sell primarily commercial items, and (2) under "exceptional circumstances" when necessary to meet the agency's needs.[183] Fourth, Congress raised the CAS applicability threshold from $25 million to $50 million.[184] Finally, Congress exempted contracts under the Federal Health Benefits Program from CAS coverage during FY 2000.[185]

The DOD Ordered to Provide Guidance on the Proper Use of Task and Delivery Order Contracts

In response to reported abuses,[186] Congress directed the DOD to revise the Federal Acquisition Regulation (FAR) to "provide guidance to agencies on the appropriate use of task order and delivery order contracts."[187] The guidance must address at least two areas. First, it must address the appropriate use of government-wide and other multi-agency contracts.[188] Second, it must define what agen-

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176. *Id. See* Matthews, *supra* note 173, at 22 (explaining that the Administration must trim other entitlement spending to offset the loss of tax revenue); Rick Maze, *Savings Plan has Uncertain Future*, ARMY TIMES, Aug. 16, 1999, at 21 (noting that service members will not become eligible to participate in the plan until the Administration finds a way to offset the estimated tax losses).

177. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1721-22 (1993).

178. National Defense Authorization Act for Fiscal Year 2000, § 801.

179. *Id.* The head of the contracting activity (HCA) may waive the requirement if the HCA: (1) concludes that including the clause is not in the public interest, and (2) notifies Congress and the Comptroller General of the waiver before the contracting activity enters into the agreement. *Id*.

180. *Id*. § 802 (amending 41 U.S.C. § 422(f)). *See The Thompson-Lieberman-Warner-Levin Procurement Streamlining Amendment to S.1059, the FY 2000 Defense Authorization Bill as Passed by the Senate May 27, 1999, and Accompanying Joint Statement*, 71 FEDERAL CONTRACTS REP. 22, May 31, 1999, at 778 [hereinafter *The Thompson-Liebeman-Warner-Levin Procurement Streamlining Amendment*] (noting that the DOD views the CAS as a "continuing barrier to the integration of commercial items into the government marketplace" because they require contractors to create unique accounting systems). The DOD also recommended relocating the CAS Board to the DOD and changing its composition; however, Congress rejected this proposal. *Senate-Passed FY 2000 DOD Authorization Bill Narrows CAS Applicability and Provides Guidance on Task Order Contracts*, 41 THE GOV'T CONTRACTOR 22, June 2, 1999, at 6-7.

181. National Defense Authorization Act for Fiscal Year 2000, § 802(a) (adding 41 U.S.C. § 422(f)(2)(B)(iii)).

182. *Id.* § 802(a) (adding 41 U.S.C. § 422(f)(2)(B)(iv)).

183. *Id.* § 802(b) (adding 41 U.S.C. § 422(f)(5)). Both waivers require a written determination. *Id*.

184. *Id*. § 802(c). Within 180 days after the enactment of the Authorization Act, the Administrator for Federal Procurement Policy must amend 48 C.F.R. § 9903.201-2 to reflect the increased threshold. *Id*. § 802(e). In addition, the Administrator for Federal Procurement Policy must review and submit a report regarding the various categories of CAS-covered contracts. *Id*. § 802(f).

185. *Id*. at 802(g). *See* 5 U.S.C.A § 8902 (West 1999) (authorizing the Office of Personnel Management to contract with qualified carriers for health benefits plans for federal employees).

cies must do to comply with the statutory requirements to: (1) engage in capital planning and investment control for information technology purchases,[189] (2) afford all contractors a fair opportunity to be considered for task and delivery order awards,[190] and (3) specify clearly the required tasks or deliverables in the statement of work for each task or delivery order.[191]

Commercial Items and Services: Past, Present, and Future

Congress amended the Office of Federal Procurement Policy Act to clarify the definition of a commercial item.[192] According to the amended definition, ancillary support services–such as installation, maintenance, repair, and training services–are commercial services if the source provides similar services contemporaneously to the public under similar terms and conditions.[193] In addition, Congress extended the pilot program that permits agencies to use special simplified acquisition procedures to purchase commercial items costing between $100,000 and $5 million until 1 January 2002.[194] Finally, Congress authorized the SECDEF to establish a pilot program that permits the DOD to treat procurements of certain commercial services as procurements of commercial items if the source provides similar services contemporaneously to the public under similar terms and conditions.[195]

Mentor-Protégé Program Extended

Congress extended the Mentor-Protégé Program–which reimburses major defense contractors for providing specified assistance to disadvantaged small business concerns–for three more years.[196] Congress, however, added new language that links reimbursement to performance and limits reimbursement to $1 million per fiscal year.[197] In addition, Congress added new language that requires a number of reports and reviews.[198]

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186. *See* DEP'T OF DEFENSE INSPECTOR GENERAL, DOD USE OF MULTIPLE AWARD TASK ORDER CONTRACTS, REP. NO. 99-116 (PDF) (Apr. 2, 1999) (noting that contracting officers issued task orders: (1) to higher-priced contractors on 36 of 58 orders; and (2) on a sole-source basis on 66 of 124 orders).

187. National Defense Authorization Act for Fiscal Year 2000, § 804(a). *See* FAR Case 1999-014, 64 Fed. Reg. 240 (1999) (proposed Dec. 15, 1999); *see also* 10 U.S.C.A. §§ 2304a-2304d (West 1999); 41 U.S.C.A. §§ 253h-253k (West 1999); *cf.* Federal Acquisition Circular 97-12, 64 Fed. Reg. 32,746 (1999). Congress also directed the Administrator for Federal Procurement Policy and the Administrator of General Services to assess the effectiveness of multiple awards under the Federal Supply Schedules program. National Defense Authorization Act for Fiscal Year 2000, § 804(c).

188. National Defense Authorization Act for Fiscal Year 2000, § 804(b)(1).

189. *Id.* § 804(b)(2)(A). *See* 40 U.S.C.A. § 1422 (West 1999).

190. National Defense Authorization Act for Fiscal Year 2000, § 804(b)(2)(B). *See* 10 U.S.C.A. § 2304c(b); 41 U.S.C.A. § 253j(b).

191. National Defense Authorization Act for Fiscal Year 2000, § 804(b)(2)(C). *See* 10 U.S.C.A. § 2304c(c); 41 U.S.C.A. § 253j(c).

192. National Defense Authorization Act for Fiscal Year 2000, § 805 (amending 41 U.S.C. § 403(12)(E)). *See Thompson-Lieberman-Warner-Levin Procurement Streamlining Amendment*, *supra* note 180, at 778 (noting that some individuals have interpreted the limited definition of commercial services in the Federal Acquisition Streamlining Act of 1994 to require the procurement of ancillary support service at the same time or from the same vendor as the commercial item being supported).

193. National Defense Authorization Act for Fiscal Year 2000, § 805. The fact that a different source provides the ancillary services at a different time is irrelevant. *Id.*

194. *Id.* § 806(a) (amending the Clinger-Cohen Act of 1996, Pub. L. No. 104-106, div. D and E, 110 Stat. 654, 10 U.S.C. § 2304 note). *See The Thompson-Lieberman-Warner-Levin Procurement Streamlining Amendment*, *supra* note 180, at 778 (indicating that the Administration requested the extension because the DOD did not have enough information to assess the effectiveness of the pilot program). The Comptroller General must submit a report to Congress evaluating the pilot program and making appropriate recommendations by 1 March 2001. National Defense Authorization Act for Fiscal Year 2000, § 806(b).

195. National Defense Authorization Act for Fiscal Year 2000, §§ 814(a), (c). The SECDEF may include utilities and housekeeping services, education and training services, and medical services in the pilot program. *Id.* § 814(b). In addition, the SECDEF may continue the pilot program for up to five years after the date he issues the required guidance for contracting for commercial services under the pilot program. *Id.* §§ 814(d), (f). However, the SECDEF must submit a report to Congress after the third full year of the pilot program, which details the prices paid, the quality and timeliness of the services provided, and the extent of the competition for the contracts awarded under the pilot program. *Id.* § 814(g). *See* H.R. CONF. REP. NO. 106-301, at 774-75 (1999) (recommending that the DOD consider discontinuing the use of clauses that require a minimum of three years experience in contracts for technical staff on service contracts).

196. National Defense Authorization Act for Fiscal Year 2000, § 811. *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 831, 104 Stat. 1485, 1607-11 (establishing the Mentor-Protégé Program); *see also* National Defense Authorization Act for Fiscal Year 2000, § 808 (extending the five percent goal for contracting with small disadvantaged business and historically black colleges and universities at 10 U.S.C. § 2323 for three years); § 817 (extending the test program for negotiating comprehensive small business subcontracting plans until 30 September 2005); *cf. id* § 807 (repealing 10 U.S.C. § 2410d(c), which terminates the subcontracting plan credit for making purchases from qualified nonprofit agencies for the blind or severely handicapped).

Innovators Wanted

Congress directed the SECDEF to develop and implement a plan to encourage commercial private sector entities, including small business concerns, to propose innovative technologies for DOD acquisition programs.[199] In addition, Congress directed the SECDEF to review the current profit guidelines in the DFARS and determine whether modifying the guidelines would give contractors a greater incentive to develop and produce innovative technologies.[200]

Is the DOD Complying with the Buy American Act? Congress Wants to Know!

Congress expressed its concern regarding the DOD's compliance with the Buy American Act in two separate provisions of the Authorization Act. In the first, Congress encouraged the DOD to "fully comply" with the Buy American Act,[201] and directed the SECDEF to consider debarring any person convicted of affixing "Made in America" labels fraudulently to products not made in the United States.[202] In the second provision, Congress directed the DOD IG to review the purchase of free weights and other exercise equipment for service members stationed at installations in the United States for compliance with the Buy American Act.[203]

Interim Reporting Rule for Simplified Acquisitions Extended

Congress extended the reporting requirements for procurements between $25,000 and $100,000 until 1 October 2004.[204]

Department of Defense Organization and Management

The Quadrennial Defense Review (QDR) Is Here to Stay

Congress made the requirement to perform a QDR permanent.[205] The goal of the QDR is twofold: (1) to determine and express the defense strategy of the United States; and (2) to establish a defense program for the next twenty years.[206] Therefore, the QDR must include a comprehensive examination of the national defense strategy, as well as the DOD's force structure, force modernization plans, infrastructure, and budget plans.[207]

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197. National Defense Authorization Act for Fiscal Year 2000 § 811.

198. *Id.* Congress directed the SECDEF to study and report on "the feasibility of transitioning [the] program to operation without a specific appropriation," and Congress directed the Comptroller General to study and report on the extent to which the program is accomplishing its goals in a cost-effective manner. *Id.*

199. *Id.* § 812. The SECDEF must publish the plan in the Federal Register for public comment by 1 March 2000, and implement the plan by 1 March 2001. *Id.*

200. *Id.* § 813. Congress specifically recommended placing more emphasis on technical risk when determining an appropriate profit margin. *Id.*

201. *Id.* § 816(a). *See* 41 U.S.C.A. § 10a-10d (West 1999); 10 U.S.C.A. § 2553 (West 1999); *see also* H.R. CONF. REP. NO. 106-310, at 779 (1999) (noting that the House amendment would have limited the ability of a DOD entity to expend funds unless the entity agreed to comply with the Buy American Act).

202. National Defense Authorization Act for Fiscal Year 2000, § 816(b). *See* 10 U.S.C.A. § 2410f.

203. National Defense Authorization Act for Fiscal Year 2000, § 819.

204. *Id.* § 818 (amending 41 U.S.C. § 427(e)).

205. *Id.* § 901 (adding 10 U.S.C. § 118 and 50 U.S.C. § 404a(a)(3)). Congress also directed each new President to submit a national security strategy report to Congress within 150 days of the date the President takes office. *Id. See id.* § 902 (increasing the minimum interval for updating and revising the DOD's strategic plan from three to four years to correspond with the QDR schedule).

206. *Id. See id.* § 241 (requiring the SECDEF to submit a different quadrennial report beginning 1 March 2000 that describes emerging operational concepts, as well as the military capabilities required to meet national security requirements over the next two to three decades); *id.* § 243 (requiring the USD(AT&L) to submit a report that describes the actions the DOD must take to ensure that the military has the capabilities it needs to meet national security requirements over the next two to three decades).

207. National Defense Authorization Act for Fiscal Year 2000, § 901. The conferees noted that a successful QDR "should be driven first by the demands of strategy, not by any presupposition about the size of the defense budget." H.R. CONF. REP. NO. 106-301, at 782 (1999).

The Under Secretary for Acquisition and Technology Gets a New Name and a New Subordinate

Recognizing the increasing importance of the logistics function in today's military, Congress renamed the current position of Under Secretary for Acquisition and Technology (USD(A&T)) to the Under Secretary for Acquisition, Technology, and Logistics (USD(AT&L)).[208] In addition, Congress created a new position. The Deputy Under Secretary for Logistics and Material Readiness will advise the USD(AT&L) on logistics and material readiness issues and serve as the principal logistics official with the DOD.[209]

Headquarters Activities Granted a Partial Reprieve

In 1997, Congress mandated a twenty-five percent reduction of personnel in major headquarters activities (MHA).[210] This year, Congress limited the reduction to five percent per year for the next three years.[211] Congress, however, also eliminated the provision that allowed the SECDEF to waive the annual limitation if he concluded that the limitation would affect the national security of the United States adversely.[212]

The Acquisition Workforce Takes a Hit–Again

Congress ordered yet another reduction in the acquisition workforce this year.[213] Thankfully, the reduction was not as drastic as the reduction proposed by the House of Representatives.[214] Under the current legislation, the SECDEF must reduce the acquisition workforce "in a number not less than the number by which that workforce is programmed to be reduced during [FY 2000] in the President's budget for [FY 2000]," or approximately 15,800 full-time equivalents.[215]

Credit Card Controls: Coming Soon to a Theater Near You

Congress directed the SECDEF to prescribe regulations to govern: (1) the use and control of credit cards and convenience checks issued to DOD personnel for official use; and (2) the alteration of remittance addresses.[216]

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208. National Defense Authorization Act for Fiscal Year 2000, § 911 (amending 10 U.S.C. § 133 and adding 10 U.S.C. § 133b). *See* H.R. CONF. REP. NO. 106-301, at 782.

209. National Defense Authorization Act for Fiscal Year 2000, § 911. The President must appoint an individual from civilian life with the advice and consent of the Senate who has "an extensive background in the sustainment of major weapon systems and combat support equipment." *Id*.

210. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 911, 111 Stat. 1857 (1997).

211. National Defense Authorization Act for Fiscal Year 2000, § 921 (amending 10 U.S.C. §§ 130a, 143). Congress also revised the baseline number and provided an expanded definition of "major headquarters activities," which were referred to previously as "management headquarters and headquarters support activities." *Id*.

212. *Compare* National Defense Authorization Act for Fiscal Year 1998 § 911 *with* National Defense Authorization Act for Fiscal Year 2000, § 921.

213. National Defense Authorization Act for Fiscal Year 2000, § 922. Once it makes the current reductions, the DOD will have reduced its acquisition workforce by 55% since 1989. H.R. CONF. REP. NO. 106-301, at 785. *See* National Defense Authorization Act for Fiscal Year 2000, § 923 (stating ironically that "there is deemed to be . . . a shortage of qualified personnel to serve in acquisition positions in the Department of Defense").

214. *See* H.R. CONF. REP. NO. 106-301, at 785 (noting that the House of Representatives recommended a reduction totaling 25,000 full-time equivalents).

215. National Defense Authorization Act for Fiscal Year 2000, § 922; H.R. CONF. REP. NO. 106-301, at 785. The SECDEF, however, may lower the specified reduction by 10% if he determines that changed circumstances and the national security interests of the United States require the lower reduction. National Defense Authorization Act for Fiscal Year 2000, § 922. *See* H.R. CONF. REP. NO. 106-301, at 785 (expressing the belief that the Administration should base future reductions on the DOD's ability to: (1) protect the taxpayer from fraud, waste, and mismanagement; and (2) maintain a quality workforce).

216. National Defense Authorization Act for Fiscal Year 2000, § 933 (adding 10 U.S.C. §§ 2784 and 2785).

General Provisions

Speeders Beware: The Secretary of the Army Is Watching!

Congress directed the Secretary of the Army to review and report on instances in which the operators of official motor vehicles have received tickets for violating motor vehicle laws during FY 1999.[217]

A Rose by Any Other Name . . . .

Last year, the House of Representatives changed the name of the Committee on National Security back to the Committee on Armed Services. This year, Congress amended the relevant statutes to reflect the Committee's "new" name.[218]

Matters Relating to Other Nations

The Balkans: Should We Stay or Should We Go?

Congress remains concerned about the effect of continued operations in the Balkans on the DOD's ability to execute the National Military Strategy,[219] and still meet other regional contingencies successfully.[220] As a result, Congress directed the SECDEF to submit a report assessing the effect of continued operations in the Balkans on specified scenarios involving conflicts on the Korean peninsula and in Southwest Asia.[221] In addition, Congress limited the funding available for continued operations in the Balkans during FY 2000.[222] Finally, Congress directed the President to submit a report that prioritizes the DOD's ongoing global missions and analyzes the feasibility of: (1) shifting resources to high priority missions, (2) consolidating or reducing troop commitments worldwide, and (3) ending low priority missions.[223]

Haitian Operations

In a related development, Congress prohibited the DOD from funding the continuous deployment of troops to Haiti after 31 May 2000.[224] If the DOD wants to deploy troops after that date, the President must submit a written report to Congress within ninety-six hours of the time the deployment begins regarding its purpose and anticipated end-date.

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217. *Id.* § 1040. This requirement applies only to off-post violations. *Id.*

218. *Id.* § 1067.

219. *Id.* § 1035. The National Military Strategy is to "deter and defeat large-scale, cross-border aggression in two distinct theaters in overlapping time frames." *See id* § 1235(a).

220. *Id.* § 1035. This report is due 180 days after the enactment of the Authorization Act. *Id.*

221. *Id*. Congress has also directed the SECDEF to submit reports regarding: (1) the accomplishments and shortcomings of Operation Allied Force and associated relief operations, (2) the ability of allied nations to participate in the major theater wars identified in the 1997 QDR, and (3) the security situation on the Korean peninsula. *Id*. §§ 1211, 1222, 1233.

222. *Id.* §§ 1004, 1006. Congress did not authorize any funding for continued combat or peacekeeping operations in the Federal Republic of Yugoslavia. Instead, Congress directed the President to request a supplemental appropriation if he determines that continued operations are necessary. *Id*. § 1004. *See* Kozaryn, *Optempo, Limited Funds Erode Readiness*, *supra* note 148 (noting that the DOD is preparing a request for a supplemental appropriation). In addition, Congress limited the funding available for peacekeeping operations in Bosnia to $1.8 billion unless the President waives the limitation after complying with certain certification and reporting requirements and requesting a supplemental appropriation. *Id.* § 1006.

223. National Defense Authorization Act for Fiscal Year 2000, § 1235(c). After detailing the DOD's current global missions, Congress expressed its "sense":

> (1) [T]he readiness of the United States military forces to execute the National Security Strategy of the United States . . . is being eroded by a combination of declining defense budgets and expanded missions; and
>
> (2) [T]here may be missions to which the United States is contributing Armed Forces from which the United States can begin disengaging.

Id. at 1235(b).

Cooperative Threat Reduction with States of the Former Soviet Union

Congress imposed numerous restrictions on the "Former Soviet Union Threat Reduction" account.[225] First, Congress limited the amount of funds the DOD may use for specific programs.[226] Second, Congress prohibited the DOD from using these funds for specific purposes and projects.[227] Third, Congress conditioned the use of these funds on the submission of certain plans, reports, and certifications.[228]

MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2000[229]

President Clinton signed the Military Construction Appropriations Act, 2000, on 17 August 1999. This Act appropriated $8.4 billion for military construction, family housing, and base closure activities.[230] Congress, however, expressed deep concerns regarding the Administration's continued "under investment" in military facilities and infrastructure.[231] In addition, Congress expressed deep concerns regarding the Administration's attempts to use incremental funding and annualize supervision, inspection, and overhead (SIOH) costs in order to defer military construction project expenses to future fiscal years.[232] Congress ultimately rejected the Administration's proposal in each case.[233]

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224. *Id*. § 1232. *See* Rick Maze, *Legislation Seeks End to Haiti Mission*, ARMY TIMES, June 21, 1999, at 17 (noting that the U.S. has been spending $20 million per year on deployments to Haiti).

225. National Defense Authorization Act for Fiscal Year 2000, §§ 1301-12. *See* Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999) (appropriating $460 million for the "Former Soviet Union Threat Reduction" Account).

226. National Defense Authorization Act for Fiscal Year 2000, § 1302.

227. *Id*. § 1303 (prohibiting the use of Cooperative Threat Reduction funds to: (1) conduct peacekeeping exercises or activities; (2) provide housing; (3) provide assistance to promote environmental restoration, job retaining, or defense conversion; or (4) eliminate conventional weapons or their delivery vehicles); *id.* § 1304 (prohibiting the use of Cooperative Threat Reduction funds to build a second wing for a fissile material storage facility in Russia until the SECDEF complies with specified notification and certification requirements); *id*. § 1305 (prohibiting the use of Cooperative Threat Reduction funds to plan, design, or construct a chemical weapons destruction facility in Russia).

228. *Id*. § 1306 (limiting the DOD's ability to use Cooperative Threat Reduction funds for the programs specified in § 1302 to 50% until the DOD submits a report indicating: (1) why it is the proper executive agency to carry out the program; and (2) how it plans to transfer its responsibilities if it is not the proper executive agency to carry out the program); *id.* § 1307 (limiting the DOD's ability to use Cooperative Threat Reduction funds to 10% until the SECDEF submits an updated multi-year plan for the use of the funds); *id.* § 1310 (prohibiting the DOD from using any Cooperative Threat Reduction funds until the SECDEF submits updated certifications under 22 U.S.C. §§ 5852, 5902(d), and 5952(d)).

229. Pub. L. No. 106-52, 113 Stat. 259 (1999).

230. *Id.* The Military Construction Appropriations Act breaks the appropriations down as follows:

Military Construction, Army	$1,042,033,000
Military Construction, Navy	901,531,000
Military Construction, Air Force	777,238,000
Military Construction, Defense-wide	593,615,000
Military Construction, Army National Guard	227,456,000
Military Construction, Air National Guard	263,724,000
Military Construction, Army Reserve	111,340,000
Military Construction, Naval Reserve	28,457,000
Military Construction, Air Force Reserve	64,404,000
NATO Security Investment Program	81,000,000
Family Housing Army	1,167,012,000
Family Housing, Navy and Marine Corps	1,232,541,000
Family Housing, Air Force	1,167,848,000
Family Housing, Defense-wide	41,490,000
DOD Family Housing Improvement Fund	2,000,000
Base Realignment and Closure Account	672,311,000

Id.

231. *See* H.R. REP. NO. 106-221, at 2 (1999) (indicating that the Administration's FY 2000 budget request was the lowest nominal request since FY 1981); S. REP. NO. 106-74, at 9 (1999) (stating that the Administration's proposed level of funding "does not provide sufficient resources to continue the [DOD's] efforts to modernize, renovate, and improve aging defense facilities").

Congress Cuts Excessive Contingency Request

Congress considered the amount the Administration requested to cover construction contingencies excessive.[234] Therefore, Congress reduced the funding available for such contingencies by $25.9 million.[235]

Are Local School Facilities Adequate?

Congress expressed concern about the adequacy of the special education facilities and services available to military families in the United States–especially at compassionate assignment posts.[236] Congress, therefore, directed the SECDEF to report on the adequacy of the facilities and services to the congressional defense committees by 30 April 2000.[237] Among other things, this report must: (1) identify needed corrective measures, (2) provide a cost estimate for the necessary improvements, and (3) recommend a funding source from within the DOD.[238]

And the Walls Came Tumbling Down: Funding the Maintenance and Repair of Flag and General Officer Quarters

In response to reports of abuse,[239] Congress imposed some new restrictions and requirements on the use of appropriated funds for the maintenance and repair of flag and general officer quarters.[240] First, Congress restricted the use of O&M funds by stating that the funds appropriated in the Military Construction Appropriations Act are the exclusive source of funds for the maintenance and repair of all military family housing units, including flag and general officer quarters.[241] Second, Congress restricted the ability of a military department to spend more than $25,000 per year for the maintenance and repair of any flag or general officer quarters unless the department notifies Congress thirty days in advance.[242] Finally, Congress imposed a new reporting requirement on the DOD. Beginning on 15 January 2000, the Under Secretary of Defense (Comptroller) must submit an annual report to the congressional appropri-

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232. *See* H.R. REP. NO. 106-221, at 2-3, 8-9 (indicating that there is no precedent for either proposed budgeting approach); S. REP. NO. 106-74, at 9-10 (strongly opposing the proposed changes).

233. *See* H.R. REP. NO. 106-221, at 9 (directing the DOD to include full SIOH funding in the initial budget year for all future budget requests); S. REP. NO. 106-74, at 10 (warning that Congress will be forced "to review all military construction financing policies and enact appropriation controls and restrictions" if the DOD fails to fund military construction projects fully in future budget requests and adhere to applicable phase-funding guidelines); *see also* Military Construction Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 2807, 113 Stat. 512 (1999) (expressing the "sense of Congress" that the President should request enough funds to produce a complete and usable facility, or a complete and usable improvement to a facility, for each proposed military construction project).

234. *See* H.R. REP. NO. 106-221, at 9-10; S. REP. NO. 106-74, at 13. The Administration requested five percent for new construction and ten percent for alterations or additions. H.R. REP. NO. 106-221, at 9-10; S. REP. NO. 106-74, at 13.

235. *See* H.R. CONF. REP. NO. 106-266, at 11 (1999). Congress distributed the reductions proportionally. *Id*.

236. *See* H.R. REP. NO. 106-221, at 21. Congress expressed concern about the impact of the base realignment and consolidation process on the ability of local school districts to meet the educational needs of the affected military and civilian populations. *Id*.

237. Military Construction Appropriations Act, 2000, Pub. L. No. 106-52, § 127, 113 Stat. 259 (1999). The SECDEF must submit this report to "the congressional defense committees." *Id.*

238. *Id.*

239. *See* H.R. CONF. REP. NO. 106-266, at 16 (expressing the conferees' dismay that the Navy and the Air Force have supplemented family housing funds with regular O&M funds for flag and general officer quarters); H.R. REP. NO. 106-221, at 2-3, 8-9 (indicating that the Navy and the Air Force have supplemented family housing funds with O&M funds on "so-called historic homes" occupied by flag and general officers); S. REP. NO. 106-74, at 27 (indicating that the Navy spent $5.5 million of its O&M appropriation to maintain, repair, and preserve three flag officers quarters from FY 1992 to FY 1999 that it had designated as "representational"); *see also* Rick Maze, *Congress OKs $8.3 Billion in Military Housing*, ARMY TIMES, Aug. 9, 1999, at 20 (noting that the Navy and the Air Force were each "faulted" for using O&M funds to renovate flag and general officer quarters); *Academy Housing Audit Results in Policy Change*, AIR FORCE NEWS, 25 Oct. 1999 (indicating that the Air Force intended to revoke its policy of allowing historic homes to be divided into separate public and residential areas); *Report: Navy Diverted Millions to Repair Admirals' Residences*, PACIFIC STARS AND STRIPES, June 26, 1999, at 5 (implying that the Navy used O&M funds to repair admirals' quarters to avoid congressional notification requirements).

240. Military Construction Appropriations Act, 2000, § 128.

241. *Id*. *See* Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8114, 113 Stat. 1212 (1999) (prohibiting the DOD from using funds appropriated in the Appropriations Act to repair or maintain military family housing units).

242. Military Construction Appropriations Act, 2000, § 128.

ations committees on "all operations and maintenance expenditures for each individual flag and general officer quarters for the prior fiscal year."[243]

Requests for Conventional Military Family Housing Construction and Improvements Deemed Inadequate

Congress also expressed concern about the Administration's over reliance on privatization to solve its military family housing woes.[244] According to the House of Representative's Committee on Appropriations, over fifty percent of the DOD's on-base housing units are deficient.[245] In addition, the DOD needs to build 52,715 additional units to meet its current housing needs.[246] Yet, the Administration's FY 2000 budget request was eighty percent lower than its FY 1999 budget request for conventional military family housing construction and improvements.[247]

Congress responded to this perceived dichotomy by directing each of the uniformed services to submit a Family Housing Master Plan to the appropriate congressional committees by 1 July 2000.[248] These plans must demonstrate how each service intends to meet its 2010 housing goals (for example, by traditional means, privatization, or both).[249] In addition, these plans must include "projected life cycle costs for family housing construction, basic allowance for housing, operation, and maintenance, other associated costs, and a time line for housing completions."[250]

MILITARY CONSTRUCTION AUTHORIZATION ACT, 2000[251]

Host Nation Contributions: New Exception to Notice Requirement

In the past, the SECDEF could use cash contributions from countries and regional organizations to carry out certain military construction projects.[252] Before the SECDEF could use these contributions, however, he had to report to Congress.[253] The military department responsible for carrying out the project then had to wait twenty-one days after the SECDEF notified Congress to begin

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243. *Id.* The DOD IG must also submit a report to assess whether the military services have: (1) complied with the laws and regulations that govern the maintenance and repair of flag and general officer quarters, and (2) violated the Antideficiency Act by funding such projects improperly. Department of Defense Appropriations Act, 2000, § 8114. The DOD IG must submit this report to the House and Senate Committees on Appropriations 90 days after the enactment of the Appropriations Act. *Id.*

244. *See* H.R. REP. NO. 106-221, at 33 (1999) (expressing the Committee's concerns regarding the DOD's use of family housing privatization authorities and stating that the "abandonment of traditional family housing construction, as a means of improving the quality of life of military families, is an inappropriate strategy for the military services to pursue"); S. REP. NO. 106-74, at 32 (expressing the Committee's concern that the DOD appears to be using the family housing privatization authorities "as a means to solve all of their housing problems and deficits").

245. *See* H.R. REP. NO. 106-221, at 23 (noting that these units require a major maintenance and repair investment to "correct deteriorated infrastructure, provide basic living standards and meet contemporary code requirements for electrical and mechanical systems, and for energy efficiency").

246. *Id.*

247. *Id*. at 24. The Army did not request any funds for conventional military family housing construction and improvements in the United States, and the Navy's request will not build a single new housing unit in the United States. *Id*. at 33.

248. Military Construction Appropriations Act, 2000, § 130. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 365, 113 Stat. 512 (1999) (requiring the Comptroller General to review the effect of inadequate funding for real property maintenance on military readiness, quality of life, and installation infrastructures).

249. Military Construction Appropriations Act, 2000, § 130. In two related developments, Congress appropriated only $2 million for the Family Housing Improvement Fund and imposed a 60-day notice requirement on the issuance of any solicitation to privatize family housing. *Id*. § 125. Congress, however, gave the SECDEF the authority to transfer "Family Housing" funds to the Family Housing Improvement Fund to fund certain family housing privatization initiatives (e.g., direct loans and loan guarantees). *Id*. § 123. *See* H.R. CONF. REP. NO. 106-226, at 18 (1999); H.R. REP. NO. 106-221, at 32-35; *cf.* S. REP. NO. 106-74, at 31-32 (requesting $25 million for the Family Housing Improvement Fund and providing no transfer authority).

250. Military Construction Appropriations Act, 2000, § 130.

251. Military Construction Authorization Act for Fiscal Year 2000, §§ 2101-2909.

252. 10 U.S.C.A. § 2350j(d) (West 1999).

253. *Id*. § 2350j(e)(1). The report had to: (1) explain the need for the project, (2) provide a current cost estimate, and (3) justify the use of 10 U.S.C. § 2350j(d). *Id.*

the project. Unfortunately, these limitations have constrained the DOD in the past. As a result, Congress added a new provision to 10 U.S.C. § 2350j that exempts projects undertaken pursuant to a declaration of war or a Presidential declaration of a national emergency from the waiting requirement.[254]

More Entities Permitted to Participate in Privatization Initiatives

Congress expanded substantially the number of entities eligible to participate in the DOD's family housing privatization initiatives.[255] First, Congress defined an "eligible entity" as "any private person, corporation, firm, partnership, company, State or local government, or housing authority of a State or local government."[256] Next, Congress replaced terms such as "private persons," "persons in the private sector," and "a nongovernmental entity" with the new term.[257] As a result, any "eligible entity" now qualifies for the incentives associated with the DOD's family housing privatization initiatives.[258]

But Ability to Construct "Ancillary Supporting Facilities" Restricted

While Congress expanded the number of entities eligible to participate in the DOD's family housing privatization initiatives, it simultaneously restricted their ability to construct "ancillary supporting facilities."[259] Thus, an entity cannot include a proposed facility in a housing project if the service secretary concludes that the proposed facility will compete directly with a post (or base) exchange; a commissary; or a nonappropriated fund, morale, welfare, and recreation activity.[260]

Utility Privatization: Shall We Fix the Power Plant Before We Give It to You?

Despite concerns regarding the privatization of utility systems,[261] Congress gave the service secretaries access to additional funds to facilitate privatization.[262] Congress specifically authorized the service secretaries to use the funds appropriated to construct, repair, or replace a utility system to facilitate the conveyance of the system to a private entity by "making a contribution toward the cost of construction, repair, or replacement of the utility system by the entity to which the utility system is being conveyed."[263]

Service Secretaries Authorized to Accept "Qualified Guarantees" for Academies

A service secretary may now accept a qualified guarantee to complete a major project for the benefit of a service academy.[264] In addition, a service secretary may now obligate and expend funds based on the guarantee, even if the total amount of the funds and

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254. Military Construction Authorization Act for Fiscal Year 2000, § 2801 (adding 10 U.S.C. § 2350j(e)(3)(A)). The SECDEF must still notify Congress of his decision to carry out the military construction project under 10 U.S.C. § 2350j; however, under this amendment, the SECDEF must notify Congress only of his decision and the estimated cost of the project. *Id*.

255. *Id.* § 2803 (amending 10 U.S.C. §§ 2871-2873, 2875-2878).

256. *Id.* § 2803(a) (amending 10 U.S.C. § 2871).

257. *Id.* § 2803(b)-(g) (amending 10 U.S.C. §§ 2872-2873, 2875-2878).

258. *Id.* The incentives include direct loans, loan guarantees, rent guarantees, and differential lease payments. *See, e.g.*, 10 U.S.C.A. §§ 2873, 2876, 2877 (West 1999).

259. Military Construction Authorization Act for Fiscal Year 2000, § 2804 (amending 10 U.S.C. § 2881). The current statute defines "ancillary supporting facilities" as "facilities related to military housing units, including childcare centers, day care centers, tot lots, community centers, housing offices, dining facilities, unit offices, and other similar facilities for the support of military housing." 10 U.S.C.A. § 2871(1).

260. Military Construction Authorization Act for Fiscal Year 2000, § 2804.

261. *See* H.R. REP. NO. 106-221, at 9 (1999) (expressing the Committee's concern that utility privatization may increase the DOD's long-term utility costs by a substantial amount and urging the DOD to study the economic consequences carefully before divesting the government's interest in any military utility system).

262. Military Construction Authorization Act for Fiscal Year 2000, § 2811 (amending 10 U.S.C. § 2688).

263. *Id.*

264. *Id.* § 2871 (adding 10 U.S.C. §§ 4357, 6975, 9356).

other resources available to fund the project are not sufficient to complete the project.[265] Before accepting a qualified guarantee, however, a service secretary must submit a report regarding the proposed guarantee to Congress and wait twenty-one days.[266]

265. *Id.* The service secretary may not commingle qualified guarantees and appropriated funds in the same contract or transaction. *Id*.

266. *Id.*

Appendix B

CONTRACT & FISCAL LAW WEBSITES

CONTENT	ADDRESS

A

ABA LawLink Legal Research Jumpstation	http://www.abanet.org/lawlink/home.html
ABA Network	http://www.abanet.org/
ABA Public Contract Law Section (Agency Level Bid Protests)	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Acquisition Reform	http://tecnet0.jcte.jcs.mil:9000/htdocs/teinfo/acqreform.html
Acquisition Reform Network	http://www.arnet.gov
ACQWeb - Office of Undersecretary of Defense for Acquisition & Technology	http://www.acq.osd.mil
ADR (Alternate Disputes Resolution)	http://www.adr.af.mil
	http://www.ogc.doc.gov/ogc/cld.html
Agency for International Development	http://www.info.usaid.gov
Air Force Contracting	http://www.safaq.hq.af.mil/contracting
Air Force Contingency Contracting Center	http://www.acclog.af.mil/lgc/contingency/contin1.htm
Air Force FAR Supplement	http://www.SAFAQ.hq.af.mil/contracting/library. Cfm
Air Force Home Page	http://www.af.mil
Air Force Materiel Command Web Page	http://www.afmc.wpafb.af.mil
Air Force Publications	http://afpubs.hq.af.mil
Air Force Site, FAR, DFARS, Fed. Reg.	http://farsite.hill.af.mil
AMC Command Counsel News Letter	http://www.amc.army.mil/amc/command_counsel/
AMC Command Counsel News Letter (Text Only)	http://www.amc.army.mil/amc/command_counsel_text
AMC –HQ Home Page	http://www.amc.army.mil
Army Acquisition Website	http://acqnet.sarda.army.mil
Army Contingency Site	http://acqnet.sarda.army.mil/acqinfo/zpcntcrt.htm
Army Home Page	http://www.dtic.mil/armylink
Army Financial Management Home Page	http://www.asafm.army.mil/homepg.htm
Army Regulations/AFARS	http://www.sarda.army.mil/library.htm
ASBCA Home Page	http://www.law.gwu.edu/burns

C

CAGE Code Assignment Also Search/Contractor Registration (CCR)	http://www.disc.dla.mil
Code of Federal Regulations	http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
Coast Guard Home Page	http://www.dot.gov/dotinfo/uscg
Commerce Business Daily (CBD)	http://cbdnet.access.gpo.gov/index.html
Competitive Sourcing (Outsourcing)	http://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pko/pkov-out.htm
	http://www.hqda.army.mil/acsim/ca/ca1.htm
	http://www.afcesa.af.mil
	http://www.afmia.randolph.af.mil/xpms/index.htm
Comptroller General Decisions	http://www.gao.gov/decisions/decision.htm
Congress on the Net-Legislative Info	http://thomas.loc.gov/
Congressional Record via GPO Access	http://www.access.gpo.gov/su_docs/aces/aces150.html
Contingency Contracting	http://www.afmc.wpafb.af.mil/organizations/HQ-AFMC/PK/pko/goto-war.htm
Contract Pricing Guides (address)	http://www.gsa.gov/staff/v/guides/instructions.htm
Contract Pricing Reference Guides	http://www.gsa.gov/staff/v/guides/volumes.htm
Cost Accounting Standards	http://www.fedmarket.com/procurement_library/regulations/cas/toc.html

D

DCAA Web Page (Links to related sites)	http://www.dcaa.mil *Before you can access this site, must register at http://www.govcon.com
Debarred List	http://epls.arnet.gov
Defense Acquisition Deskbook	http://www.deskbook.osd.mil
Defense Acquisition University	http://www.acq.osd.mil/dau/
Defense Contracting Regulations	http://www.acq.osd.mil/dp/dars/
Defense Procurement	http://www.acq.osd.mil/dp/
Defense Tech. Info. Ctr. Home Page (use jumper Defenselink and other sites)	http://www.dtic.mil
Department of Justice (jumpers to other Federal Agencies and Criminal Justice)	http://www.usdoj.gov
Department of Veterans Affairs Web Page	http://www.va.gov
DFARS Web Page (Searchable)	http://www.acq.osd.mil/dp/dars/dfars.html
DFAS	http://www.dfas.mil
DIOR Home Page - Procurement Statistics	http://web1.whs.osd.mil/diorhome.htm

DOD Contracting Regulations	http://www.defenselink.mil
DOD Electronic Forms	http://web1.whs.osd.mil/icdhome/forms.htm
DOD Home Page	http://www.dtic.mil/defenselink
DOD Instructions and Directives	http://web7.whs.osd.mil/corres.htm
DOD SOCO Web Page	http://www.defenselink.mil/dodgc/defense_ethics/
DOL Wage Determinations	http://www.ceals.usace.army.mil/netahtml/srvc. html

E

Electronic Earlybird	http://ebird.dtic.mil
Executive Orders	http://www.pub.whitehouse.gov/search/executive-orders.html

F

FAC (Federal Register Pages only)	http://www.gsa.gov:80/far/FAC/FACs.html
FAR (GSA)	http://www.arnet.gov/far/
Federal Acquisition Jump-station	http://nais.nasa.gov/fedproc/home.html
Federal Acquisition Virtual Library (FAR/DFARS, CBD, De-barred list, SIC)	http://159.142.1.210/References/References.html
Federal Employees (FEDWEEK)	http://www.fedweek.com
Federal Law Sites	http://fedlaw.gsa.gov/
Federal Register	http://www.access.gpo.gov/su_docs/aces/aces140.html
Federal Web Locator	http://law.house.gov/7.htm
Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
Financial Operations (Jumpsites)	http://www.asafm.army.mil
Financial Management Service Website	http://www.fms.treas.gov/finman.html

G

GAO Home Page	http://www.gao.gov
GAO Comptroller General Decisions (Allows Westlaw/Lexis like searches)	http:/www.access.gpo.gov/su_docs/aces/aces170.shtml?desc017.html
General Services Administration	http://gsa.gov
GovBot Database of Government Web sites	http://www.business.gov
GovCon - Contract Glossary	http://www.govcon.com/information/gcterms.html
Govt't Contracts Practice Group (Fried, Frank, Harris, Shriver, and Jacobson)	http://www.ffhsj.com/govtcon/govtcon.htm
GSA Legal Web Page	http://www.legal.gsa.gov

I

Information Technology Homepage	http://www.afmc.wpafb.af.mil/organizations/HQ-AFMC/PK/pks/index.htm
Information Technology Policy	http://www.itpolicy.gsa.gov

J

Joint Publications	http://www.dtic.mil/doctrine
Joint Travel Regulations (JTR)	http://www.dtic.mil/perdiem/jtr.html
Justice Department	http://www.usdoj.gov

L

Lawguru (Legal Research Jumpsite)	http://www.lawguru.com/
Laws, Regulations, Executive Orders, & Policy	http://159.142.1.210/References/References.html#policy, etc
Library (jumpers to various contract law sites - FAR/FAC/ DFARS/AFARS)	http://acqnet.sarda.army.mil/library/default.htm
Library of Congress Web Page	http://lcweb.loc.gov

M

Marine Corps Home Page	http://www.usmc.mil

N

NAF Contracting Regulation – AR 215-4	http://trol.redstone.army.mil/mwr/naf_contracting/
MWR Websites	http://www.mwr.navy.mil http://www-r.afsv.af.mil http://www.usmc-mccs.org/
NAF Financial (MWR)	http://www.asafm.army.mil/fo/naf/naf.htm
National Performance Review Library	http://www.npr.gov/library/index.html
NAVSUP Home Page	http://www.navsup.navy.mil/javaindex.html
Navy Acquisition Reform	http://www.acq-ref.navy.mil
Navy Acquisition & Business Management	http://www.abm.rda.hq.navy.mil
Navy Home Page	http://www.navy.mil

O

OGC Contract Law Division	http://www.ogc.doc.gov/OGC/CLD.HTML
OGC (Army - Ethics & Fiscal)	http://www.hqda.army.mil/ogc/eandf.htm
OGE Ethics Advisory Opinions	http://fedbbs.access.gpo.gov/libs/oge_opin.html
OGE Web Page (Ethics training materials and opinions	http://www.usoge.gov
Office of Acquisition Policy	http://www.gsa.gov/staff/ap.htm
Office of Deputy ASA (Financial Ops) Information on ADA violations/NAF Links/Army Pubs/and Various other sites	http://www.asafm.army.mil/financial.htm
Office of General Counsel – U.S. Department of Commerce	http://www.ogc.doc.gov/OGC/CLD.HTML
Office of Management and Budget (OMB)	http://www.access.gpo.gov/su_docs/budget/
Office of Management and Budge Circulars	http://www.whitehouse.gov/WH/EOP/omb
OFPP (Best Practices Guides)	http://www.arnet.gov/BestP/BestP.html
Operational Contracting Home Page	http://www.afmc.wpafb.af.mil/organizations/HQ-AFMC/PK/pko/index.htm

P

Policy Works - Per Diem Tables	http://www.policyworks.gov/org/main/mt/homepage/mtt/perdiem/perd97.htm
Privatization – Housing	http://www.acq.osd.mil/iai/hrso/

S

SBA Government Contracting Home Page	http://www.sbaonline.sba.gov/GC/
Service Contract Act Directory of Occupations	http://www.dol.gov//dol/esa/public/regs/compliance/whd/wage/main.htm
SIC	http://spider.osha.gov/oshstats/sicser.html

T

Taxes/Insurance	http://www.payroll-taxes.com
Taxpayers Against Fraud – False Claims Act Legal Center	http://www.taf.org

U

U.S. Agency for International Development	http://www.info.usaid.gov/
U.S. Court of Appeals for the Federal Circuit	http://www.fedcir.gov

U.S. Court of Federal Claims	http://www.ogc.doc.gov/fedcl/
U.S. Congress on the Net-Legislative Info	http://thomas.loc.gov/
U.S. Code	http://uscode.house.gov/usc.htm

W

White House	http://www.whitehouse.gov

Y

Year 2000 Website	http://www.asafm.army.mil/fo/y2k/index.htm